

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

In the Matter of)
)
The Tennis Channel, Inc.,)
Complainant)
v.)
Comcast Cable Communications, LLC,)
Defendant)

JUN - 7 2011
MB Docket No. 10-204
File No. CSR-8258-1
Federal Communications Commission
Office of the Secretary

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF DEFENDANT COMCAST CABLE COMMUNICATIONS, LLC**

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SUMMARY

1. Under Section 616 of the 1992 Cable Act, the claimant has the burden of proving that because of affiliation-based discrimination¹ by the respondent, the claimant's ability to compete fairly has been unreasonably restrained.² In this case, that means that Tennis Channel has the burden of proving: (1) that Comcast rejected Tennis Channel's carriage proposal in 2009 because Tennis Channel is not an affiliate; and (2) that Comcast's action has unreasonably restrained Tennis Channel's ability to compete fairly.³ Tennis Channel has failed to prove either of these elements.

2. First, there is no evidence that Comcast's decision to decline Tennis Channel's carriage proposal in 2009 had anything to do with affiliation or non-affiliation. Instead, the evidence showed that the decision was based on a cost-benefit analysis by Comcast which indicated that the proposal likely would have resulted in substantial losses to Comcast.⁴ Tennis Channel was unable to offer any evidence to dispute this cost-benefit analysis and the hearing testimony established that it was Tennis Channel, not Comcast, that cut off negotiations rather than attempt to find a compromise where the costs and benefits were more evenly balanced.⁵

¹ "Affiliation-based discrimination" and "discrimination" are used as shorthand for discrimination on the basis of affiliation or non-affiliation.

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. § 536(a)(3) ("1992 Cable Act"); *see also* 47 C.F.R. § 76.1301(c).

³ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁴ *See infra* ¶¶ 27-28, 37-40.

⁵ *See infra* ¶¶ 32, 38-42. It is noteworthy that within months following Tennis Channel's refusal to continue negotiations, at least two other independent networks were able to negotiate broader carriage agreements with Comcast notwithstanding the lack of any affiliation with Comcast. *See infra* ¶ 42.

3. As the Commission ruled in *MASN*, it is not discrimination under Section 616 when, as here, a multichannel video programming distributor (“MVPD”) declines a carriage proposal after determining that its economic costs substantially outweighed the benefits.⁶ Section 616 does not require MVPDs to incur losses or increase subscriber fees for programming which, as here, is already available for purchase by subscribers who wish to receive it.⁷

4. Second, the evidence does not show that Tennis Channel has been unreasonably restrained from competing fairly. To the contrary, the evidence shows that Tennis Channel has been able to negotiate equity-for-carriage deals with Comcast’s major competitors, DIRECTV and Dish Network, and those agreements enable Tennis Channel to compete fairly for subscribers in every market in the United States.⁸

(DIRECTV and Dish Network are satellite companies whose signals are offered to subscribers and potential subscribers throughout the United States.) Comcast subscribers who wish to receive Tennis Channel’s programming thus have at least three options: purchasing the sports tier package from Comcast, switching to DIRECTV or switching to Dish Network.⁹ (The major telephone companies, Verizon and AT&T, who also carry Tennis Channel, provide additional options in many parts of the United States.¹⁰) Thus, Tennis Channel is able to compete fairly for subscribers in the same way that DIRECTV

⁶ *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18106, 18112-13 ¶¶ 12, 19 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011) (hereinafter “*MASN*”).

⁷ *See id.*

⁸ *See infra* ¶¶ 21-23, 135.

⁹ *See infra* ¶¶ 135-37.

¹⁰ *See infra* ¶ 136-37.

and Dish Network are, and potential subscribers who want Tennis Channel's programming are free to choose it.

5. Tennis Channel would not have to compete for subscribers at all if Comcast, and all other cable MVPDs, were required to distribute Tennis Channel to all subscribers at no additional charge. But the goal of Section 616 is to enable unaffiliated programmers to compete fairly, not to insulate them from competition by subsidizing them at the expense of MVPDs and their customers.¹¹

6. Section 616 also was not intended to eliminate all carriage differences among networks, including those that are the result of natural competitive forces such as the timing of market launches and the size and strength of consumer demand. Here, Golf Channel and Versus were launched years before Tennis Channel, when sports tiers did not exist, and the size and strength of their fan base is – as Tennis Channel's own documents acknowledge – much larger.¹² These specific differences are reflected in different carriage arrangements which do not evidence affiliation-based discrimination. Section 616 does not require that all carriage differences be eliminated; it only prohibits differences that are the result of affiliation-based discrimination, rather than market forces.¹³

7. Having failed to prove the required elements for a Section 616 claim, Tennis Channel is not entitled to any relief in this matter. Moreover, the relief that Tennis Channel has requested is not proper under Section 616. Tennis Channel has, for

¹¹ See *infra* ¶ 181. Congress has specified that no cable system shall “be subject to regulation as a common carrier . . . by reason of providing any cable service.” 47 U.S.C. § 541(c).

¹² See *infra* ¶¶ 20 n.38, 74-77.

¹³ See 47 U.S.C. § 536(a)(3); see also *infra* ¶¶ 185-91.

example, requested a level of distribution that is far broader than any other MVPD in the market is currently providing it, and it is also requesting that, in addition to providing broader distribution, Comcast increase its total license payments to Tennis Channel by more than [REDACTED] }¹⁴

8. Even if Tennis Channel were entitled to broader distribution under Section 616, it would not be entitled to receive additional fees for that broader distribution. An increase in distribution might better enable Tennis Channel to compete for larger advertising revenues, but there is no evidence that Tennis Channel now is unable to compete fairly for those advertising revenues, or for anything else, without the dramatic increase in license fees which it is also asking that Comcast be ordered to pay. Remedial relief under Section 616 is limited to what is necessary for an unaffiliated programmer to “compete fairly,” and does not allow the recovery of an economic windfall.¹⁵

PROPOSED FINDINGS OF FACT

I. The Parties

9. Complainant Tennis Channel is a single-sport niche network launched in 2003 that offers programming relating to tennis.¹⁶ Tennis Channel’s owners include satellite operators DIRECTV and Dish Network, which collectively own approximately [REDACTED] of the network.¹⁷

10. Defendant Comcast Cable Communications, LLC is a subsidiary of Comcast Corporation, which is one of the nation’s leading providers of entertainment,

¹⁴ See *infra* ¶ 146.

¹⁵ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁶ Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 5.

¹⁷ Solomon Cross, Apr. 25, 2011 Tr. 509:12-510:1; Comcast Exhs. 100, 241, 242, 247, 398, 439; see *infra* ¶ 23.

information and communications products and services. Comcast Cable operates the company's multichannel video programming distribution service.¹⁸

II. The Early Years Before Tennis Channel Existed

11. Tennis Channel launched in 2003, during [REDACTED] [REDACTED] }¹⁹ By that time, distributors already had comprehensive program offerings as a result of network launches in the 1980s and 1990s.²⁰

12. Two of the channels which had been launched in the mid-1990s were Golf Channel and The Outdoor Life Network (later renamed Versus).²¹ When Golf Channel and Versus were first launched, Comcast owned a minority interest in them, but through a series of acquisitions over the years, Comcast came to be the sole owner.²²

13. By the early 2000s, Golf Channel and Versus had achieved wide distribution not only on Comcast systems but throughout the industry.²³ The distribution reflected the fact that in the early years it was easier to launch a new network because of greater demand and because total license fees paid by distributors were lower.²⁴

¹⁸ Tennis Channel Exh. 308 (Comcast Corp. 2010 Form 10-K) at 1, 88; Comcast Exh. 75 (Bond Written Direct) ¶¶ 2, 32.

¹⁹ Comcast Exh. 573 at TTCCOM_00037385.

²⁰ Comcast Exh. 583; Bond Direct, Apr. 29, 2011 Tr. 1952:2-1954:2.

²¹ Bond Direct, Apr. 29, 2011 Tr. 1953:7-12; Comcast Exh. 203 at 312, 600.

²² Tennis Channel Exh. 126 at COMTTC_00052118-19. As a result of the recent NBCUniversal ("NBCU") transaction which closed in early 2011, Comcast's ownership of Golf Channel and Versus was reduced to just over 50%. (Tennis Channel Exh. 13 ¶¶ 16-17).

²³ Bond Direct, Apr. 29, 2011 Tr. 1964:3-9; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-13.

²⁴ Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-15; Orszag Direct, Apr. 27, 2011 Tr. 1223:9-1224:16.

14. In addition, through incentives such as launch support payments, networks such as Golf Channel and Versus were able to greatly reduce the costs to distributors of carrying them. In the early years of their existence, before Tennis Channel existed, Golf Channel and Versus paid hundreds of millions in such launch support payments to Comcast and other distributors (including distributors subsequently acquired by Comcast).²⁵

15. By 2003, when Tennis Channel launched, however, much of the initial demand for new programming already had been filled, and the increasing costs to distributors of carrying all of this programming had become a significant issue.²⁶ Competition from satellite providers such as DIRECTV and Dish Network, as well as from telephone companies such as AT&T and Verizon, also had made it increasingly difficult for cable companies to absorb higher programming costs.²⁷

III. Tennis Channel Launches and Pursues a Sports Tier Strategy

16. Tennis Channel's earliest distributor agreements in 2002 and 2003 were with other cable companies and the National Cable Television Cooperative ("NCTC"), not Comcast.²⁸ Those early agreements were generally for carriage on a sports tier – the industry term for an arrangement whereby programming, in this case sports

²⁵ Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28-29; Bond Direct, Apr. 29, 2011 Tr. 1962:5-10; Comcast Exh. 77 (Egan Written Direct) ¶ 13.

²⁶ Comcast Exh. 77 (Egan Written Direct) ¶¶ 14-15; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15; Bond Direct, Apr. 29, 2011 Tr. 1969:15-1970:4; *see supra* ¶¶ 13-15.

²⁷ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15.

²⁸ Comcast Exh. 165 (6/7/02 Time Warner Cable Affiliation Agreement); Comcast Exh. 231 (6/17/02 NCTC Affiliation Agreement); Comcast Exh. 235 (3/7/03 Cox Letter Agreement).

programming, is offered not to everyone who signs up for more broadly distributed tiers of cable service but, instead, only to those subscribers who request the programming and are willing to pay an additional monthly fee to receive it.²⁹ One of the advantages of this type of distribution is that it allows the distributor to control costs by paying only for programming that subscribers are interested in and willing to pay for.³⁰ From the perspective of a programmer attempting to launch a new network, sports tiers are an attractive option to offer distributors because by lowering distributors' costs, they make it less risky for distributors to launch new networks.³¹

17. By definition, sports tiers do not have the same broad distribution as the basic, more popular programming packages that MVPDs offer.³² In its 2005 strategic plan, Tennis Channel noted this as [REDACTED]

[REDACTED]³³

18. In 2005, Tennis Channel persuaded Comcast to carry it by agreeing to contract terms that permitted Comcast to carry Tennis Channel on a sports tier, as other MVPDs, such as Time Warner and Cox, already were doing.³⁴ The Affiliation Agreement between Comcast and Tennis Channel contained an MFN (most favored

²⁹ Comcast Exh. 75 (Bond Written Direct) ¶ 4; Comcast Exhs. 52, 165, 231, 235.

³⁰ Comcast Exh. 52; Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9; Egan Direct, Apr. 28, 2011 Tr. 1595:1-15.

³¹ Tennis Channel expressly stated to Comcast that sports tier carriage would provide Comcast with [REDACTED] (Comcast Exh. 52).

³² Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9.

³³ Comcast Exh. 508 at TTCCOM_00065361.

³⁴ Comcast Exh. 84 (Affiliation Agreement between Comcast and Tennis Channel); Comcast Exh. 52; Comcast Exh. 75 (Bond Written Direct) ¶ 5; Bond Direct, Apr. 29, 2011 Tr. 1985:20-1988:13.

nation) provision entitling Comcast to benefit from other agreements that Tennis Channel might already have or might negotiate with other MVPDs in the future, and also

[REDACTED]

[REDACTED]³⁵ The Affiliation Agreement gives Comcast complete discretion to place Tennis Channel on whatever channel it wants.³⁶

19. Tennis Channel's Affiliation Agreement with Comcast remains in full force and effect, and Tennis Channel concedes that Comcast has fully complied with its terms.³⁷

20. Shortly after the Affiliation Agreement with Comcast was signed, Tennis Channel hired a new CEO who soon pursued a very different distribution strategy.³⁸

IV. Tennis Channel's New Equity-for-Carriage Strategy

21. Ken Solomon took over as Tennis Channel's new CEO in April 2005.³⁹ Mr. Solomon had extensive prior experience in the video programming industry, though

³⁵ Comcast Exh. 84 at TTCCOM_00020421-23.

³⁶ Comcast Exh. 84 at TTCCOM_00020405-06.

³⁷ Comcast Exh. 84 at TTCCOM_00020400; Comcast Exhs. 85, 204; Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

³⁸ Shortly before Mr. Solomon's arrival, Frank Garland, Tennis Channel's then-senior advertising executive, informed Tennis Channel's top management that its ratings and advertising projections [REDACTED]

[REDACTED] (Comcast Exh. 104; Comcast Exh. 572; Solomon Cross, Apr. 25, 2011 Tr. 357:22-358:8). The inflation resulted from Tennis Channel's mistaken belief that tennis had audience appeal similar to golf and other popular televised sports. Mr. Garland informed Tennis Channel management in December 2004 that [REDACTED] (Comcast Exh. 572).

³⁹ Solomon Cross, Apr. 25, 2011 Tr. 353:6-10.

none of that experience was with a single-sports network.⁴⁰ Shortly thereafter, Mr. Solomon decided to abandon sports tiers as a strategy, telling the Tennis Channel board that [REDACTED]⁴¹

22. Mr. Solomon decided to pursue broader distribution through equity-for-carriage deals with MVPDs.⁴² An equity-for-carriage deal is one in which a programmer induces an MVPD to give its programming broader distribution by offering the MVPD an equity stake in the programmer.⁴³ Internal Tennis Channel documents, including e-mail and Mr. Solomon’s own notes, refer to equity-for-carriage offers that Tennis Channel made to DIRECTV and Dish Network not long after Mr. Solomon took over as CEO and chairman.⁴⁴ Though Mr. Solomon at first denied during his testimony that the transactions with DIRECTV and Dish Network were negotiated as equity-for-carriage deals,⁴⁵ his testimony on that point was not credible, and eventually Mr. Solomon had to concede that Tennis Channel made equity-for-carriage proposals to Dish Network and DIRECTV to incentivize them to provide distribution.⁴⁶

⁴⁰ Solomon Cross, Apr. 25, 2011 Tr. 353:11-354:2.

⁴¹ Comcast Exhs. 268, 701 at TTCCOM_00067839; Solomon Cross, Apr. 25, 2011 Tr. 395:11-17.

⁴² Comcast Exh. 701 at TTCCOM_00067839; Solomon Cross, Apr. 25, 2011 Tr. 407:22-410:5, 413:11-16, 419:3-420:10.

⁴³ Solomon Cross, Apr. 25, 2011 Tr. 397:6-399:11.

⁴⁴ Comcast Exhs. 111 at TTCCOM_00003632, 508 at TTCCOM_00065359, 517, 703, 704.

⁴⁵ Solomon Cross, Apr. 25, 2011 Tr. 383:10-384:5; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) at ¶ 8 n.3.

⁴⁶ Solomon Cross, Apr. 25, 2011 Tr. 408:13-410:5 (“Q: So this, you agree, is an equity for carriage offer that you made to DirecTV? A: It’s a proposal for them to make an offer back to us. Q: An equity for carriage proposal? A: Yes.”), 413:11-16, 419:3-420:10 (“Q: This letter is describing an equity for carriage proposal in which you are offering [Dish Network] equity in exchange for getting greater distribution, correct? . . .

23. In 2006 and 2007, Tennis Channel signed equity-for-carriage deals first with Dish Network and then with DIRECTV.⁴⁷ In exchange for distribution to a guaranteed minimum percentage of subscribers, Dish Network received a [REDACTED] equity interest in Tennis Channel and DIRECTV received a [REDACTED] stake.⁴⁸ In addition, each MVPD received a seat on Tennis Channel's board of directors.⁴⁹ None of the MVPDs that had previously done sports tier deals with Tennis Channel had received any equity in Tennis Channel or board seats, and none were required to distribute Tennis Channel as broadly as Dish Network and DIRECTV were required to distribute it.⁵⁰

V. The 2006 and 2007 MFN Offers

24. Shortly after signing its equity-for-carriage deal with Dish Network in February 2006, Tennis Channel made an offer to Comcast under the MFN provision in its

THE WITNESS: . . . It appears, yes, that that's what we're proffering in this note. BY MR. CARROLL: Q: And that is what you proffered in the note to Dish, correct? A: Yes."); Comcast Exhs. 503, 703.

⁴⁷ Comcast Exhs. 100, 241, 242, 247.

⁴⁸ Comcast Exhs. 100, 241, 398, 439.

⁴⁹ Solomon Direct, Apr. 25, 2011 Tr. 316:10-14. Mr. Solomon – whose positions include chairman of Tennis Channel's board of directors – testified on direct that the representatives of Dish Network and DIRECTV on the Tennis Channel board “recused themselves from anything having to do with distribution issues.” (Solomon Direct, Apr. 25, 2011 Tr. 316:3-18). This testimony is contradicted by Tennis Channel's [REDACTED]

[REDACTED] (Comcast Exh. 730). This testimony also is contradicted by the representation of Tennis Channel's counsel that the Dish Network and DIRECTV representatives would only “recuse themselves on decisions that come up that affect their own companies.” (Colloquy, Apr. 26, 2011 Tr. 540:12-19).

⁵⁰ Comcast Exhs. 84, 165, 231, 235.

agreement.⁵¹ The MFN offer was an equity-for-carriage proposal comparable to the one that Tennis Channel had signed with Dish Network.⁵² After receiving the offer, Comcast performed a cost-benefit analysis in which it compared the increased cost in subscriber fees it would be required to pay with the value of the equity that Comcast would receive in Tennis Channel. The cost-benefit analysis revealed that the costs would substantially exceed the benefits, and Mr. Madison Bond, then Comcast's head of programming acquisition, determined that there was no basis to believe that any additional benefits such as enhanced ability to attract or retain subscribers would accrue to Comcast from distributing Tennis Channel more broadly.⁵³ Accordingly, Comcast declined the offer.⁵⁴

25. The following year, Tennis Channel made another MFN offer to Comcast after it signed its equity-for-carriage deal with DIRECTV.⁵⁵ Once again, Comcast performed a cost-benefit analysis comparing the cost of distribution to additional subscribers with the value of the equity in Tennis Channel which Comcast would receive. Once again, the analysis revealed that the costs would substantially exceed the value of the equity, and Mr. Bond determined that no other benefits would offset those costs. On that basis, Comcast declined the offer.⁵⁶

26. It is undisputed that after each of its decisions in 2006 and 2007, Comcast explained to Tennis Channel the cost-benefit analysis that it had performed, and there is

⁵¹ Comcast Exh. 58; *see also* Comcast Exh. 84 at TTCCOM_00020421-23.

⁵² Comcast Exhs. 58, 87.

⁵³ Comcast Exh. 60; Comcast Exh. 76 (Donnelly Written Direct) ¶¶ 7-11; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

⁵⁴ Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

⁵⁵ Comcast Exh. 86.

⁵⁶ Comcast Exhs. 66, 86; Comcast Exh. 76 (Donnelly Written Direct) ¶¶ 13-17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

no evidence that anyone at Tennis Channel complained that Comcast’s analysis of each offer was in any way wrong or discriminatory.⁵⁷ In fact, during hearing testimony, Mr. Solomon admitted that he did not believe Comcast’s decision in 2007 was discriminatory.⁵⁸

VI. The 2009 Proposal

27. The central factual dispute in this case concerns another proposal which Tennis Channel made to Comcast in 2009 and communications between the two sides relating to that proposal. The two key witnesses on this central issue were Tennis Channel’s CEO, Mr. Solomon, and the former head of content acquisition at Comcast, Mr. Bond.⁵⁹ Mr. Bond’s testimony was consistent, competent, and credible.⁶⁰ The testimony of Mr. Solomon, by contrast, was often inconsistent and not credible. Based on these credibility findings, the testimony of Mr. Bond is accepted and that of Mr. Solomon rejected, on factual issues where the two gave differing accounts.

⁵⁷ In particular, Tennis Channel did not complain about Comcast’s changes to the projections in Tennis Channel’s business plan. (Comcast Exh. 106; Donnelly Direct, May 2, 2011 Tr. 2519:22-2520:17). Tennis Channel was aware that the projections set forth in its business plan were significantly overstated. Upon his arrival at Tennis Channel, Mr. Solomon had described Tennis Channel’s business plan as a [REDACTED] (Comcast Exh. 709; *see also* Comcast Exhs. 104, 572 (stating that Tennis Channel employees had previously inflated ratings and advertising projections)).

⁵⁸ Solomon Cross, Apr. 25, 2011 Tr. 457:11-16. [REDACTED]
[REDACTED]
(Comcast Exhs. 112, 320).

⁵⁹ After the NBCU transaction closed in 2011, Mr. Bond changed jobs and became the Executive Vice President of Content Distribution for NBCU, where he is responsible for distributing all of the NBC cable channels, broadcast stations and other content. (Bond Direct, Apr. 29, 2011 Tr. 1945:4-22; Comcast Exh. 75 (Bond Written Direct) ¶ 2).

⁶⁰ In *WealthTV*, Mr. Bond testified before the Presiding Judge who found Mr. Bond’s testimony to be “consistent, competent and credible.” *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, 24 FCC Rcd 12967, 12988-89 ¶ 44 (ALJ 2009) (hereinafter “*WealthTV*”).

28. Mr. Solomon testified that he approached Comcast in May 2009 and made a proposal for Comcast to move Tennis Channel off the sports tier where it had been distributed since 2005.⁶¹ Under the 2009 proposal, Comcast would have been required to increase the number of subscribers receiving Tennis Channel by { [REDACTED] } times by including Tennis Channel in one of the two most popular packages that Comcast offered its subscribers (known as digital starter (or D0, and digital expanded basic) or D1).⁶² Because the fees Tennis Channel charges are calculated per subscriber, the 2009 proposal would have increased the total fees Comcast would have to pay Tennis Channel over the remaining life of their contract by [REDACTED].⁶³ Tennis Channel presented no evidence showing that Comcast would be able to earn additional revenues to offset this substantial increase in costs it would have incurred under the 2009 proposal.

29. Mr. Solomon testified, however, that he believed that Comcast would find the 2009 proposal “irresistible” because of the increased Grand Slam and high definition coverage which Tennis Channel was able to provide.⁶⁴ Comcast had, however, already declined two equity-for-carriage proposals in 2006 and 2007, the terms of which were more favorable financially to Comcast than the “irresistible” proposal in 2009.⁶⁵ And

⁶¹ Solomon Direct, Apr. 25, 2011 Tr. 304:4-305:9.

⁶² Comcast Exhs. 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶ 14; Comcast Exh. 78 (Gaiski Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2093:4-2097:18.

⁶³ Comcast Exh. 588; Comcast Exh. 638; Comcast Exh. 78 (Gaiski Written Direct) ¶ 14; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14. Tennis Channel’s own contemporaneous analysis confirmed that accepting Tennis Channel’s 2009 proposal would have increased Comcast’s costs considerably. (Comcast Exh. 467).

⁶⁴ Solomon Direct, Apr. 25, 2011 Tr. 261:7-12, 262:10-12, 263:10-20, 266:9-22, 268:13-19, 285:8-9.

⁶⁵ Comcast Exhs. 86, 87.

prior to 2009, Tennis Channel had had no success in persuading other cable companies that, like Comcast, had contracts entitling them to sports tier carriage to surrender those contract rights in favor of broader distribution agreements.⁶⁶ In early 2009, every other major cable company that carried Tennis Channel did so on some form of a sports tier, and two other distributors (AT&T and Cablevision) still did not carry Tennis Channel at all.⁶⁷

30. In addition, the evidence showed that since at least January 2007, Tennis Channel had been considering [REDACTED]
[REDACTED]
[REDACTED] }⁶⁸ and that by early 2009, months before it made its “irresistible” offer to Comcast, Tennis Channel already was [REDACTED]
[REDACTED]
[REDACTED] }⁶⁹

31. Mr. Solomon’s testimony that the 2009 proposal was “irresistible” is therefore not credible, and it seems more likely that the 2009 offer was part of a legal strategy to set up a claim against Comcast than a sincere effort to start a negotiation. Mr. Bond testified that in April 2009, Mr. Solomon sent a letter that for the first time was

⁶⁶ Comcast Exhs. 112, 320.

⁶⁷ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Comcast Exh. 659; Comcast Exh. 517 (Solomon Dep.) 196:9-197:19.

⁶⁸ Comcast Exhs. 22, 24, 125, 136, 137, 271, 516, 522, 626. For example, in early 2007, [REDACTED]
[REDACTED] (Comcast Exh. 24).

⁶⁹ Herman Cross, Apr. 26, 2011 Tr. 662:20-663:19; Comcast Exh. 368 (Herman Dep.) 162:17-178:19; 206:10-208:19); Comcast Exh. 517 (Solomon Dep.) 278:9-280:6.

threatening in tone, and that the offer itself in May 2009 was presented more as a take-it-or-leave-it proposition than as the start of a negotiation.⁷⁰

32. Mr. Solomon testified on direct that after receiving Tennis Channel's offer in May 2009, Mr. Bond never made a counterproposal and that it was Mr. Bond who abruptly cut off any further discussions between the two sides.⁷¹ Mr. Solomon recanted that testimony on cross-examination, however, and admitted that, in fact, Mr. Bond had made a counterproposal and that it was Mr. Solomon, and not Mr. Bond, who had cut off any further discussion by declaring that he, Mr. Solomon, was not interested in "half measures" and that further discussion between the two sides would be "a waste of time."⁷² During his testimony, Mr. Bond explained that Mr. Solomon had presented the 2009 proposal as almost a take-it-or-leave-it offer but that notwithstanding that approach, he, Mr. Bond, was prepared to engage in further discussions and had even offered to explore ways in which he might identify some regions where Comcast might be able to offer Tennis Channel increased distribution.⁷³ Mr. Bond confirmed, though, that Mr. Solomon had cut off further discussions by making the pronouncements about half measures and further discussions being a waste of time.⁷⁴

⁷⁰ Comcast Exh. 592; Comcast Exh. 75 (Bond Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2107:16-2109:17.

⁷¹ Solomon Direct, Apr. 25, 2011 Tr. 283:5-21; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) ¶¶ 28-29.

⁷² Solomon Cross, Apr. 25, 2011 Tr. 348:13-350:1; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2130:7.

⁷³ Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:21.

⁷⁴ Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct Apr. 29, 2011 Tr. 2128:9-2129:21; *see also* Comcast Exh. 646 (Simon Dep.) 50:9-17.

33. It is also not credible that Mr. Solomon would have believed that improvements in the quality of programming on Tennis Channel would cause Comcast to view the 2009 proposal more favorably than the 2006 and 2007 MFN offers. First, Tennis Channel had been unsuccessful at persuading other MVPDs to carry its programming more broadly, and thus at the time of the 2009 proposal, most other major distributors continued to carry Tennis Channel on a sports tier or did not carry it at all.⁷⁵ Second, many of the so-called programming improvements were not really new in 2009, but either had been implemented before the 2007 MFN offer or were already part of the contract rights that Comcast enjoyed under its 2005 Affiliation Agreement. For example, Tennis Channel had obtained its limited telecast rights to the French Open, the Australian Open and Wimbledon by 2007 and [REDACTED] [REDACTED] } and the 2005 Affiliation Agreement already required Tennis Channel to provide HD programming to Comcast when it became available.⁷⁶

34. Mr. Solomon's testimony that Tennis Channel's programming should be compelling to Comcast viewers because a "preponderance" of Tennis Channel's "anchor programming" is live also was not credible.⁷⁷ On cross-examination, Mr. Solomon tried

⁷⁵ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Solomon Cross, Apr. 25, 2011 Tr. 422:21-423:7; Comcast Exh. 201; Comcast Exh. 517 (Solomon Dep.) 154:3-11; 196:9-197:19 [REDACTED]

[REDACTED] Unwilling to launch Tennis Channel on a broad tier, Cablevision subsequently joined the NCTC and in August 2009 launched Tennis Channel on a sports tier pursuant to Tennis Channel's 2002 contract with the NCTC. (Comcast Exh. 598; *see also* Comcast Exh. 231 (NCTC Affiliation Agreement)). In June 2010, AT&T launched Tennis Channel on a tier with about [REDACTED] } penetration. (Comcast Exhs. 201, 250).

⁷⁶ Comcast Exhs. 66, 164, 204.

⁷⁷ Solomon Cross, Apr. 25, 2011 Tr. 464:4-464:9.

to defend this overstatement by claiming that in his view 25% was a “preponderance,”⁷⁸ and after the Presiding Judge observed that the witness was not answering his question, Mr. Solomon finally admitted that his use of the term “anchor programming” was not standard in the industry and was Tennis Channel’s term.⁷⁹

35. Mr. Solomon also knew from communications with Mr. Bond before the 2009 proposal was presented that Comcast’s major concern would be the significant increase in costs.⁸⁰ Comcast had consistently identified increased costs as a major concern at the time of the 2006 and 2007 MFN offers, and Mr. Bond reiterated that concern in discussions with Mr. Solomon in the months leading up to the 2009 proposal.⁸¹ Thus, in conversations between the two on March 4 and again on March 30, Mr. Bond explained to Mr. Solomon that increasing distribution beyond the sports tier would impose significant cost increases on Comcast and invited Mr. Solomon to propose ways in which the additional cost burden to Comcast might be reduced or eliminated.⁸²

36. In response, however, Mr. Solomon sent Mr. Bond a letter on April 22 which Mr. Bond credibly characterized as aggressive in that it failed to address the cost issue that Mr. Bond had raised and, instead, threatened that Comcast had not “lived up to” the “spirit and substance” of the 2005 Affiliation Agreement.⁸³ Tennis Channel has

⁷⁸ Solomon Cross, Apr. 25, 2011 Tr. 465:13-15.

⁷⁹ Solomon Cross, Apr. 25, 2011 Tr. 524:9-526:11.

⁸⁰ Comcast Exh. 517 (Solomon Dep.) 300:25-302:7.

⁸¹ Comcast Exh. 75 (Bond Written Direct) ¶ 12.

⁸² Comcast Exh. 75 (Bond Written Direct) ¶¶ 10, 12; Bond Direct, Apr. 29, 2011 Tr. 2088:21-2089:2; Bond Cross, Apr. 29, 2011 Tr. 2208:1-11.

⁸³ Comcast Exh. 592; Comcast Exh. 75 (Bond Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2107:16-2109:17.

conceded in this proceeding, however, that Comcast has fully complied with the terms of that agreement.⁸⁴

37. Mr. Bond testified that after receiving the 2009 proposal, Comcast performed another cost-benefit analysis which showed, once again, that the increased costs would be significant, with no offsetting benefit or gain.⁸⁵ Mr. Bond testified that he asked his direct report, Jennifer Gaiski, to calculate the increased cost of the proposal and also to check with the division heads to determine if there was any indication of subscriber interest in broader distribution of Tennis Channel in any local markets.⁸⁶ Ms. Gaiski testified that she performed both tasks, and her testimony was fully corroborated by contemporaneous documentation of both tasks.⁸⁷ During her hearing testimony, Ms. Gaiski identified the cost calculation spreadsheet she had prepared shortly after the 2009 offer showing that the increased cost to Comcast would be between [REDACTED] [REDACTED] over the remaining contract term,⁸⁸ and Ms. Gaiski also identified the handwritten notes she made of her conversation in early June with division heads.⁸⁹

Those contemporaneous records completely corroborated Ms. Gaiski's testimony that the

⁸⁴ Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

⁸⁵ Comcast Exh. 75 (Bond Written Direct) ¶¶ 18-19; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 17-18; Bond Direct, Apr. 29, 2011 Tr. 2122:11-2125:9; Gaiski Direct, May 2, 2011 Tr. 2343:1-2369:5.

⁸⁶ Comcast Exh. 75 (Bond Written Direct) ¶ 16; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 15-16; Bond Direct, Apr. 29, 2011 Tr. 2110:8-2111:9.

⁸⁷ Comcast Exh. 130; Comcast Exh. 588; Comcast Exh. 78 (Gaiski Written Direct) ¶ 14; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14. Where – as here – the legitimate business reasons for a negative carriage decision are memorialized in contemporaneous documentation, that documentation is proof of the absence of affiliation-based discrimination. *MASN*, 25 FCC Rcd at 18114 ¶ 21.

⁸⁸ Comcast Exh. 588; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14.

⁸⁹ Comcast Exh. 130; Gaiski Direct, May 2, 2011 Tr. 2353:16-21.

2009 proposal would increase Comcast’s cost by roughly [REDACTED] and that all four regional divisions⁹⁰ had reported no significant interest from subscribers that might justify incurring those additional costs.⁹¹

38. Both Mr. Bond and Ms. Gaiski testified that based on this cost-benefit analysis, it made no economic sense for Comcast to accept Tennis Channel’s proposal, and that it was on this basis that the proposal was declined.⁹² Both also explained that considerations of affiliation or non-affiliation played no role in their decision making.⁹³ Both Mr. Bond’s and Ms. Gaiski’s testimony were consistent with the contemporaneous evidence and completely credible.⁹⁴

39. Tennis Channel’s counsel raised questions about whether revenues from additional advertising availability (known as “ad avails”) might help offset some of this increased cost.⁹⁵ But Mr. Bond and Ms. Gaiski explained that Comcast had significant excess ad avail inventory which it was unable to use, so that increasing that excess

⁹⁰ Each individual Comcast cable system is run as its own profit center. (Bond Direct, Apr. 29, 2011 Tr. 1999:6-2000:16). In effect, each system is “essentially a cable operator . . . running a business” with associated costs and revenues. (*Id.* 2000:5-16). Systems are charged with managing their costs – which include programming expenditures and employee salaries – and maximizing their revenues. (*Id.*) As Mr. Bond explained, the systems “have various expenses and they have a profit that’s generated and they’re judged on their performance.” (*Id.*) The overall budget for Comcast Cable at the corporate level is “the aggregation of all of those individual profit centers.” (*Id.* 2002:6-16).

⁹¹ Comcast Exhs. 130, 588; Comcast Exh. 78 (Gaiski Written Direct) ¶ 16.

⁹² Comcast Exhs. 130, 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶¶ 18-19; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 17-18; Bond Direct, Apr. 29, 2011 Tr. 2122:11-2125:9; Gaiski Direct, May 2, 2011 Tr. 2343:1-2369:5.

⁹³ Comcast Exh. 78 (Gaiski Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2127:3-7.

⁹⁴ *See, e.g.*, Comcast Exhs. 130, 588, 638.

⁹⁵ Orszag Cross, Apr. 27, 2011 Tr. 1283:7-14.

inventory would not have been a benefit.⁹⁶ And although Tennis Channel asked questions about whether wider distribution might lead to increased subscribers, it offered no proof of that, and, in fact, the evidence in the record is to the contrary.⁹⁷ Thus, Ms. Gaiski's notes of her June 2009 field check corroborate that in the southern division Comcast had suffered no loss of subscribers when it shifted Tennis Channel from broad carriage to the sports tier in some systems it had acquired from another MVPD.⁹⁸ And in response to questioning by Tennis Channel's counsel, Mr. Bond's successor, Mr. Greg Rigdon, explained that he had independently come to the same conclusion when, prior to joining Comcast, he had been in charge of content acquisition at another cable company, Charter.⁹⁹

40. Comcast's cost-benefit analysis is also supported by other evidence in the record and by the absence of any proof of market fallout from Comcast's decision to continue carrying Tennis Channel on the sports tier. The parties agree that DIRECTV and Dish Network are competitors of Comcast,¹⁰⁰ yet Tennis Channel offered no evidence that Comcast had lost any subscribers to its competitors after it declined the MFN offers in 2006 and 2007. And because Comcast subscribers already could receive Tennis Channel programming as part of the sports tier for a monthly fee in the range of

⁹⁶ Bond Direct, Apr. 29, 2011 Tr. 2126:3-2127:2; Bond Cross, Apr. 29, 2011 Tr. 2323:2-2324:8; Gaiski Cross, May 2, 2011 Tr. 2414:15-18.

⁹⁷ See *supra* ¶ 28; *infra* ¶¶ 39-40.

⁹⁸ Comcast Exh. 130; Gaiski Direct, May 2, 2011 Tr. 2365:4-2366:17.

⁹⁹ Rigdon Direct, Apr. 28, 2011 Tr. 1805:21-1806:22; Rigdon Cross, Apr. 28, 2011 Tr. 1854:10-1855:10 (explaining that "there was no real discernible consumer demand" for Tennis Channel).

¹⁰⁰ Tennis Channel Trial Brief at 3; Bond Cross, Apr. 29, 2011 Tr. 2309:22-2310:4.

\$5-8, it was reasonable for Comcast to believe that subscribers who really wanted to see tennis programming (subscribers who Tennis Channel itself describes as among the wealthiest viewers in the market) would simply sign up for its sports tier, rather than terminate their cable service and switch to Dish Network or DIRECTV.¹⁰¹ As Tennis Channel itself acknowledged, that logic applies to all cable MVPDs with existing sports tiering rights, not just Comcast. Thus, an internal Tennis Channel distribution update to Mr. Solomon in 2010 regarding the continued refusal of another cable MVPD, Time Warner Cable, to increase distribution beyond its sports tier, states that any distributor with the right to carry Tennis Channel on a sports tier would [REDACTED] [REDACTED] }¹⁰²

41. Finally, Comcast's decision was consistent with, but independent of, the decisions of other MVPDs such as Time Warner Cable, Charter and Cablevision to also carry Tennis Channel on a sports tier and to decline offers from Tennis Channel for broader carriage.¹⁰³

42. The evidence shows that had Tennis Channel been willing to negotiate with Comcast on the cost issue, further discussions would not have been the "waste of time" that Mr. Solomon claimed. Within four months of their June discussion, Mr. Solomon had discussions with one of his colleagues at Tennis Channel about the fact that two other networks not affiliated with Comcast, Sportsman Channel and Outdoor

¹⁰¹ Comcast Exh. 78 (Gaiski Written Direct) ¶ 4; Comcast Exh. 283; Bond Direct, Apr. 29, 2011 Tr. 1988:11-1989:14, 2052:13-2054:4; Rigdon Direct, Apr. 28, 2011 Tr. 1806:16-22, 1808:21-1810:8.

¹⁰² Comcast Exh. 121 at TTCCOM_00065126.

¹⁰³ Comcast Exhs. 31, 32, 165, 201, 487, 529, 534, 545.

Channel, had signed deals for broader distribution in certain Comcast regions.¹⁰⁴ That fact corroborated Mr. Bond's statements to Mr. Solomon about being willing to find regions to increase distribution. And Mr. Solomon's reaction to this news corroborated Mr. Bond's point to him that cost was the major issue. In an e-mail responding to the news, Mr. Solomon observed "Yup . . . \$\$\$," which he agreed during cross-examination meant that there had been some value exchanged by those other networks in order to incentivize Comcast to give them more distribution.¹⁰⁵ During his testimony, Mr. Solomon admitted that he had never followed up with Mr. Bond after learning about these other transactions to see whether Tennis Channel might be able to strike a similar deal under which it offered some additional value in exchange for the additional distribution it was seeking.¹⁰⁶ That failure to follow up with Mr. Bond is consistent with Mr. Bond's view that Tennis Channel's proposal was really an all-or-nothing demand, and not an attempt at negotiation.¹⁰⁷

VII. Golf Channel and Versus Were Not Factors in the 2009 Proposal Discussions

43. In the substantive discussions between the two sides concerning the 2009 proposal, the distribution of Golf Channel and Versus was never mentioned. Nor was there any mention of those networks in the discussions that Comcast had internally in deciding how to respond to the proposal.¹⁰⁸ Nor did Mr. Solomon mention them during

¹⁰⁴ Comcast Exh. 707.

¹⁰⁵ Comcast Exh. 707; Solomon Cross, Apr. 25, 2011 Tr. 482:16-483:1.

¹⁰⁶ Solomon Cross, Apr. 25, 2011 Tr. 486:6-487:13.

¹⁰⁷ Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:7.

¹⁰⁸ See, e.g., Comcast Exhs. 130, 588, 638; Comcast Exh. 78 (Gaiski Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2127:3-7; Solomon Recross, Apr. 25, 2011 Tr. 533:14-20.

the phone call with Mr. Bond when he learned that Comcast had declined the proposal.¹⁰⁹

There was, for example, no moment when Mr. Solomon compared Tennis Channel to Golf Channel and Versus, or requested that Comcast give Tennis Channel the same distribution rights as Versus and Golf Channel.¹¹⁰

44. No evidence was presented that Comcast's affiliated networks Golf Channel and Versus benefited in any way from Comcast's decision to decline Tennis Channel's 2009 proposal. Golf Channel and Versus already enjoyed wide distribution throughout the industry by 2009 as mature networks launched many years earlier than Tennis Channel.¹¹¹

45. Tennis Channel itself did not see its programming as competing with the programming on Versus and Golf Channel. Instead, Tennis Channel saw itself as complementing those channels by reaching a different, underserved fan base (tennis enthusiasts) with somewhat different demographics.¹¹² Thus, in its 2009 proposal to Comcast, Tennis Channel emphasized the fact that its sports programming appealed [REDACTED] } than other, more traditional sports programming did.¹¹³

46. There is also no evidence that Comcast ever considered Tennis Channel's programming to be a threat to the continued success of Golf Channel and Versus. Since Tennis Channel was already available to Comcast subscribers on the sports tier, Comcast

¹⁰⁹ Gaiski Redirect, May 2, 2011 Tr. 2476:5-9.

¹¹⁰ Gaiski Redirect, May 2, 2011 Tr. 2476:5-9.

¹¹¹ Bond Direct, Apr. 29, 2011 Tr. 1952:9-1954:2; Comcast Exh. 77 (Egan Written Direct) ¶ 12; Orszag Direct, Apr. 27, 2011 Tr. 1223:7-1224:16; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:1.

¹¹² Comcast Exhs. 11 at TTCCOM_00027627, 186; Herman Cross, Apr. 26, 2011 Tr. 669:22-670:5; Comcast Exh. 368 (Herman Dep.) 322:23-323:19.

¹¹³ Comcast Exh. 180 at TTCCOM_00020724, 20727.

subscribers would not have had to leave Comcast in order to receive more tennis programming.¹¹⁴ The evidence also showed that at the highest levels of the company, Comcast tried to promote Tennis Channel to its subscribers.¹¹⁵

**VIII. Other MVPDs Rejected Broader Carriage of
Tennis Channel After Its 2009 Proposal to Comcast**

47. Carriage decisions by other distributors also contradict Mr. Solomon's testimony that so-called improvements in Tennis Channel by 2009 made broader distribution of the network "irresistible." Thus, the evidence showed that Tennis Channel unsuccessfully sought broader distribution from several large distributors in 2009 and 2010.

48. In July 2009, Tennis Channel sought broad carriage from Cablevision, which did not then carry the network.¹¹⁶ Cablevision told Tennis Channel that its proposals were [REDACTED] and had explained that broad carriage would [REDACTED]
[REDACTED]
[REDACTED] }¹¹⁷ Unwilling to distribute Tennis Channel broadly, Cablevision joined the NCTC and launched Tennis Channel on a sports tier in August 2009 pursuant to Tennis Channel's 2002 contract with the NCTC.¹¹⁸

49. In March 2010, Tennis Channel proposed to Time Warner Cable that it carry the network on a [REDACTED]

¹¹⁴ Comcast Exh. 75 (Bond Written Direct) ¶ 18; Comcast Exh. 78 (Gaiski Written Direct) ¶ 4; Bond Direct, Apr. 29, 2011 Tr. 1988:11-1989:14, 2052:13-2054:4.

¹¹⁵ Comcast Exh. 604 (June 2007 e-mail from Comcast Chief Executive Officer Brian Roberts to Mr. Bond).

¹¹⁶ Solomon Cross, Apr. 25, 2011 Tr. 422:21-423:2; Comcast Exhs. 32, 534.

¹¹⁷ Comcast Exhs. 32, 529, 534.

¹¹⁸ Comcast Exh. 598; *see also* Comcast Exh. 231 (NCTC Affiliation Agreement).

{ }¹¹⁹ Like Comcast, Time Warner Cable had a longer term deal pursuant to which Tennis Channel granted it the right to carry the network on a sports tier, and that deal was not expiring when Tennis Channel made its proposal for digital basic carriage.¹²⁰ Time Warner Cable rejected Tennis Channel’s proposal, explaining that the { } since Tennis Channel’s proposal would have increased Time Warner Cable’s total license fees by approximately { } per year. Time Warner Cable

{ }¹²¹ Time Warner Cable elected to continue carrying Tennis Channel on a sports tier under its contract.¹²² Mr. Solomon testified that Time Warner Cable’s decision to continue carrying Tennis Channel on a sports tier did not constitute discrimination.¹²³

50. In 2010, Tennis Channel proposed to Dish Network that it distribute Tennis Channel to { } more subscribers. Tennis Channel argued that its programming warranted broader carriage, and emphasized that broader distribution would increase the value of Dish Network’s equity in Tennis Channel.¹²⁴ But Dish Network declined Tennis Channel’s proposal, and instead its distribution of Tennis Channel { } from 2009 to 2010.¹²⁵

¹¹⁹ Comcast Exh. 487.

¹²⁰ Solomon Cross, Apr. 25, 2011 Tr. 340:18-341:2; Comcast Exh. 165.

¹²¹ Comcast Exh. 31.

¹²² Comcast Exhs. 165, 201.

¹²³ Solomon Cross, Apr. 25, 2011 Tr. 342:4-343:13.

¹²⁴ Comcast Exh. 632.

¹²⁵ Comcast Exh. 201; Comcast Exh. 650 at TTCCOM_00065227, 65230; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23.

51. In May 2010, Tennis Channel approached Charter to seek distribution [REDACTED] }¹²⁶ Charter rejected Tennis Channel's requests to carry the service more broadly due to a lack of consumer demand for Tennis Channel.¹²⁷

52. In 2010, Tennis Channel acknowledged that distributors with the contractual right to carry the service on their sports tiers would rather do so than distribute Tennis Channel more broadly.¹²⁸ Mr. Solomon testified that Tennis Channel lacks negotiating leverage with distributors whose affiliation agreements with Tennis Channel are not expiring, since those distributors have the ability to continue to offer Tennis Channel on its sports tier, and, as a result, are not choosing between broad carriage of Tennis Channel and no carriage.¹²⁹

53. Each of the five largest cable companies – Comcast, Time Warner Cable, Cox, Charter, and Cablevision – continues to exercise its contractual right to carry Tennis Channel on its sports tier.¹³⁰ Tennis Channel has not alleged that the carriage decisions of any of these other distributors were discriminatory.

¹²⁶ Comcast Exh. 545.

¹²⁷ Comcast Exh. 545; Rigdon Direct, Apr. 28, 2011 Tr. 1798:15-1799:5, 1806:16-22.

¹²⁸ Comcast Exh. 121 [REDACTED]

¹²⁹ Solomon Cross, Apr. 25, 2011 Tr. 339:22-340:17; Solomon Recross, Apr. 25, 2011 Tr. 531:6-15.

¹³⁰ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 19, 22-23; Comcast Exh. 659; Comcast Exh. 517 (Solomon Dep.) 154:3-154:11; 196:9-197:19.

IX. Comcast Does Not Discriminate in Favor of Its Affiliated Networks

A. Comcast's Carriage of Golf Channel and Versus Is Based on Legitimate and Non-Discriminatory Business Reasons

54. The consistent and undisputed testimony of Comcast's fact witnesses establishes that Comcast has legitimate and non-discriminatory business reasons for carrying Golf Channel and Versus on broadly distributed tiers.

55. Both Golf Channel and Versus (then the Outdoor Life Network) were broadly distributed on Comcast and other distributors by the late 1990s, years before Tennis Channel was launched in 2003.¹³¹ Both networks established their wide distribution in an era in which it was far easier to obtain broad carriage.¹³² In addition, both networks paid distributors including Comcast hundreds of millions of dollars in launch incentives to reduce the cost of broad carriage.¹³³

56. Both Golf Channel and Versus launched before sports tiers were created; Comcast's affiliation agreements with Golf Channel and Versus require broad distribution; and neither network has ever offered Comcast the right to carry it on a sports tier.¹³⁴

¹³¹ Bond Direct, Apr. 29, 2011 Tr. 1957:6-17, 1962:1-10, 1964:3-9, 1967:4-9; Bond Cross, Apr. 29, 2011 Tr. 2166:15-21.

¹³² See *supra* ¶¶ 13-15.

¹³³ See *supra* ¶ 14.

¹³⁴ Bond Cross, Apr. 29, 2011 Tr. 2160:10-2161:17; Bond Direct, Apr. 29, 2011 Tr. 1949:9-1950:17; Tennis Channel Exh. 139 (Bond Dep.) 220:8-24. Comcast most recently renewed its affiliation agreements with Versus and Golf Channel in 2009 and 2011, respectively. (Comcast Exh. 458, Tennis Channel Exh. 155). Neither of those renewals involved negotiations over an increase in the network's distribution. (Tennis Channel Exh. 143 (Shell Dep.) 93:7-94:8; Tennis Channel Exh. 139 (Bond Dep.) 211:12-19, 219:21-220:7).

57. Once networks gain broad penetration, distributors rarely negatively reposition them because doing so would upset the settled expectations of subscribers and generate subscriber churn.¹³⁵ Mr. Bond testified that established networks generally retain their broad distribution level, and that “the vast majority . . . of renewal agreements don’t involve a change in distribution.”¹³⁶

58. Comcast’s renewal discussions with established networks, whether affiliated networks or unaffiliated, focus on the network’s per-subscriber fee rather than changes in the level of distribution.¹³⁷ Mr. Bond and Ms. Gaiski provided unrebutted testimony that Comcast handles its renewal negotiations with Golf Channel and Versus on an arm’s-length basis, the same way it handles its renewal negotiations with other established networks that were launched and gained broad carriage at similar times.¹³⁸ For instance, Comcast bargains with Golf Channel and Versus for the most advantageous MFN protections possible.¹³⁹

59. The record shows that both Golf Channel and Versus have a proven ability to attract and retain subscribers.¹⁴⁰ During Charter’s 2007 negotiations over the renewal

¹³⁵ Comcast Exh. 75 (Bond Written Direct) ¶ 31; Bond Cross, Apr. 29, 2011 Tr. 2194:19-2195:5, 2235:10-2237:3; Tennis Channel Exh. 139 (Bond Dep.) 219:13-220:7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 26; Comcast Exh. 80 (Orszag Written Direct) ¶ 42 & n.59.

¹³⁶ Bond Cross, Apr. 29, 2011 Tr. 2194:19-2195:21, 2240:21-2241:13; Tennis Channel Exh. 139 (Bond Dep.) 219:13-220:7.

¹³⁷ Bond Cross, Apr. 29, 2011 Tr. 2235:3-2237:3.

¹³⁸ Bond Cross, Apr. 29, 2011 Tr. 2235:3-2238:16; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 24, 26.

¹³⁹ Bond Cross, Apr. 29, 2011 Tr. 2237:11-2238:16; Comcast Exh. 78 (Gaiski Written Direct) ¶ 24.

¹⁴⁰ Comcast Exh. 78 (Gaiski Written Direct) ¶ 26; Rigdon Recross, Apr. 28, 2011 Tr. 1920:13-22.

of its affiliation agreements with Golf Channel and Versus, Golf Channel viewers “overwhelmed” Charter with demands that it continue to air the network.¹⁴¹ Hundreds of thousands of Charter subscribers called Charter’s customer call centers, and senior programming executives directly received hundreds of e-mail messages from both Golf Channel and Versus viewers.¹⁴² In response, Charter maintained Golf Channel and Versus on a highly penetrated tier.¹⁴³

60. Comcast’s broad carriage of Golf Channel and Versus is consistent with the carriage of those networks by other distributors, which have no ownership of either network.¹⁴⁴ All major MVPDs, except Dish Network, carry both Golf Channel and Versus to more than { [REDACTED] } of their subscribers,¹⁴⁵ while most major MVPDs carry Tennis Channel on their sports tiers.¹⁴⁶ Every major MVPD – including Tennis Channel’s parent companies Dish Network and DIRECTV – carries both Golf Channel and Versus to [REDACTED] than Tennis Channel.¹⁴⁷

¹⁴¹ Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6-1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2-1919:7.

¹⁴² Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6-1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2-16, 1920:3-12.

¹⁴³ Rigdon Recross, Apr. 28, 2011 Tr. 1920:13-22 (“Frankly, the company was in such a state of panic based on the calls coming in both for Golf and Versus that it no longer mattered.”).

¹⁴⁴ Comcast Exh. 75 (Bond Written Direct) ¶¶ 29; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:15; Comcast Exhs. 259, 260, 1102.

¹⁴⁵ Comcast Exhs. 259, 260, 1102, 1103.

¹⁴⁶ *Supra* ¶¶ 18, 53.

¹⁴⁷ Comcast Exhs. 201, 260, 2601, 1102, 1103.

B. Comcast's Carriage of Three Major League Networks Is Based on Legitimate and Non-Discriminatory Business Reasons

61. The consistent and undisputed testimony of Comcast's fact witnesses establishes that Comcast has legitimate and non-discriminatory business reasons for carrying three Major League networks – NBA TV, NHL Network and MLB Network – on Comcast's D1 tier.¹⁴⁸

62. As to NBA TV, Mr. Bond and Ms. Gaiski testified that in 2009, Comcast provided that network with broader distribution [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵⁰ This testimony is uncontroverted by any fact witness or other competent evidence.

63. As to NHL Network, Mr. Bond and Ms. Gaiski testified that in 2009, Comcast provided that network with broader distribution pursuant to an MFN offer that allowed Comcast to move the network from the sports tier to D1 without a material cost increase.¹⁵¹

64. After concluding an agreement with DIRECTV in which it reduced its per-subscriber fee and offered equity in exchange for broader carriage, NHL Network

¹⁴⁸ See *infra* ¶¶ 62-65.

¹⁴⁹ Comcast Exh. 75 (Bond Written Direct) ¶ 23; Bond Direct, Apr. 29, 2011 Tr. 2145:7-2147:11; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Cross, May 2, 2011 Tr. 2430:3-10.

¹⁵⁰ Comcast Exh. 75 (Bond Written Direct) ¶ 23.

¹⁵¹ Comcast Exhs. 311, 312; Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:19-2149:4, 2151:5-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

offered Comcast the same terms pursuant to an MFN obligation.¹⁵² In that offer, NHL Network reduced its license fee to approximately { [REDACTED] } per subscriber per month, which is significantly [REDACTED] the rate that Comcast currently pays for Tennis Channel.¹⁵³ It is also [REDACTED]

[REDACTED]¹⁵⁴ Due to the price cut, Comcast’s overall license fees to NHL Network did not change materially as a result of providing expanded distribution.¹⁵⁵ This testimony is uncontroverted by any fact witness or other competent evidence.

65. As to the MLB Network, Mr. Bond and Ms. Gaiski testified that in 2009, Comcast launched that network on D1 because Major League Baseball (“MLB”) conditioned Comcast’s access to the valuable out-of-market package, MLB Extra Innings, on a D1 launch for MLB Network.¹⁵⁶ MLB previously had granted exclusive access to distribute Extra Innings to DIRECTV,¹⁵⁷ but that led to congressional hearings

¹⁵² Comcast Exhs. 311, 312; Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:3-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22.

¹⁵³ Comcast Exhs. 311, 312; Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:19-2149:4, 2151:5-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

¹⁵⁴ Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 13-14, 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

¹⁵⁵ Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:19-2149:4, 2151:5-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

¹⁵⁶ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2138:16-2144:17; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Cross, May 2, 2011 Tr. 2430:3-10.

¹⁵⁷ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2139:22-2140:22.

and political fallout for MLB.¹⁵⁸ Subsequently, MLB offered other distributors, including Comcast, access to Extra Innings under the same terms as its agreement with DIRECTV. Specifically, in exchange for the right to distribute Extra Innings, Comcast agreed to launch MLB Network (which did not exist) on D1, and to pay certain guarantees on Extra Innings.¹⁵⁹ Like Cox, Time Warner Cable and other distributors, Comcast accepted the deal.¹⁶⁰ As part of the deal, Comcast was offered, and accepted, a similar equity interest in MLB Network that MLB had offered to DIRECTV.¹⁶¹ Comcast was never offered the option of carrying MLB Network on a sports tier.¹⁶² This testimony is uncontroverted by any fact witness or other competent evidence.¹⁶³

X. Credibility and Weight of Expert Testimony

66. The weight of the credible expert testimony confirms that Comcast's decision not to accept the 2009 proposal did not constitute discrimination on the basis of affiliation.

¹⁵⁸ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2139:22-2141:1, 2143:22-2144:6.

¹⁵⁹ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2141:6-2144:17.

¹⁶⁰ Bond Direct, Apr. 29, 2011 Tr. 2141:6-2144:17.

¹⁶¹ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2141:22-2143:3.

¹⁶² Bond Cross, Apr. 29, 2011 Tr. 2180:12-22.

¹⁶³ Dr. Singer testified at trial, based solely on a *Washington Times* article, that Comcast was planning to carry MLB Network on a sports tier prior to being granted equity. (Singer Direct, Apr. 26, 2011 Tr. 855:1-9; Singer Cross, Apr. 26, 2011 Tr. 952:8-955:6). Putting aside the fact that the article provides no support for Dr. Singer's testimony, such expert testimony would not be a competent basis for disputing Mr. Bond's and Ms. Gaiski's fact testimony based on firsthand knowledge.

A. The Carriage Decisions of Other MVPDs Provide Independent Evidence That Comcast Did Not Discriminate on the Basis of Affiliation

67. The evidence regarding carriage of Tennis Channel by other MVPDs, which is not disputed, shows that Comcast's carriage of Tennis Channel is in line with the market generally. When the largest distributors are ranked by Tennis Channel's penetration among their subscribers, Comcast falls in the middle.¹⁶⁴

68. Mr. Orszag persuasively opined that other cable companies provide the most relevant benchmarks for Comcast's carriage decisions because they face the same competitive pressures (primarily from satellite and telco distributors), use similar technologies, and confront similar bandwidth constraints,¹⁶⁵ and because no cable company distributes Tennis Channel pursuant to an equity-for-carriage deal.¹⁶⁶

69. It is undisputed that all of the large cable companies carry Tennis Channel on some form of a sports tier.¹⁶⁷ [REDACTED]

[REDACTED]¹⁶⁸ The independent carriage decisions of these comparable distributors, none of which is affiliated with Tennis Channel or a

¹⁶⁴ Comcast Exh. 1103.

¹⁶⁵ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 20.

¹⁶⁶ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Comcast Exh. 659; Solomon Cross, Apr. 25, 2011 Tr. 423:15-424:5.

¹⁶⁷ *Supra* ¶ 53.

¹⁶⁸ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23 & Table 1A (all cable companies other than Comcast carry Tennis Channel, on average, at [REDACTED] penetration); Comcast Exh. 659. Notably, Dr. Singer's analysis does not consider all of the MVPDs that do not carry Tennis Channel. (Tennis Channel Exh. 16 (Singer Written Direct) ¶ 54 (counting only "NCTC member systems that carry Tennis Channel through NCTC"); Orszag Direct, Apr. 27, 2011 Tr. 1221:20-1222:7 ("Dr. Singer . . . ignores every single MVPD in the country that does not carry the Tennis Channel.")).

network comparable to Tennis Channel, confirm that Comcast did not act on a discriminatory motive in declining Tennis Channel's 2009 proposal for broad carriage.

70. Direct comparisons with satellite distributors DIRECTV and Dish Network are not probative because both carry Tennis Channel pursuant to equity-for-carriage deals.¹⁶⁹ Internal Tennis Channel documents show that broad carriage of Tennis Channel is consistent with those distributors' strategy of competing with cable companies by offering different programming choices (so-called [REDACTED] and reflects that satellite subscribers more closely [REDACTED] [REDACTED] } than cable subscribers do.¹⁷⁰

71. The carriage of Tennis Channel by telcos Verizon and AT&T further illustrates the legitimacy of Comcast's decision not to give up its contractual right to carry Tennis Channel on a sports tier. Verizon carries Tennis Channel under the NCTC contract, [REDACTED]

[REDACTED]¹⁷¹ Verizon launched Tennis Channel broadly, but negatively repositioned the network in January 2010 after

¹⁶⁹ *Supra* ¶¶ 21-23. [REDACTED]

[REDACTED] (Comcast Exh. 508; Comcast Exh. 517 (Solomon Dep.) 314:23-315:5).

¹⁷⁰ Comcast Exhs. 111, 428; Comcast Exh. 80 (Orszag Written Direct) ¶ 24; Comcast Exh. 122. DIRECTV alone provides Tennis Channel with approximately [REDACTED] subscribers, nearly [REDACTED] of all Tennis Channel subscribers. (Comcast Exh. 201; Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8). In fact, DIRECTV's carriage of Tennis Channel is so out of line with the marketplace that Tennis Channel refers to DIRECTV as its [REDACTED] (Comcast Exh. 121).

¹⁷¹ Comcast Exhs. 231, 552. The NCTC agreement provides that a distributor shall not [REDACTED]

concluding, through experience, that broad distribution [REDACTED]¹⁷²
As required by its contract, [REDACTED] but Tennis
Channel has estimated that, because of subscriber attrition, its penetration on Verizon is
falling [REDACTED] per month.¹⁷³ AT&T did not even carry Tennis Channel until June
2010, long after Tennis Channel stopped agreeing to sports tier carriage, and as of
September 2010 AT&T carried Tennis Channel on its U-450 tier, [REDACTED]
[REDACTED]¹⁷⁴

72. Tennis Channel's distribution reflects the fact that its programming is not
sufficiently compelling to make a material contribution to the ability of a distributor to
retain or attract subscribers. Tennis Channel's event coverage consists largely of matches
that it receives for free that other networks are not interested in carrying.¹⁷⁵ Tennis
Channel's limited Grand Slam coverage is of minimal value to distributors, since the
majority of matches in those tournaments, including the most important matches, are
available to the distributors' subscribers on other television networks and online.¹⁷⁶
Tennis Channel airs only early round coverage of the U.S. Open¹⁷⁷ and the Australian

¹⁷² Comcast Exhs. 627, 650. As a result of the negative reposition, Verizon
distributes Tennis Channel on a tier received by [REDACTED] of Verizon subscribers.
(Comcast Exh. 650).

¹⁷³ Comcast Exh. 650.

¹⁷⁴ Comcast Exhs. 201, 250.

¹⁷⁵ Comcast Exhs. 127, 624, 342 (Tennis Channel broadcasts "the tournaments the
major networks don't want to cover – which is to say, almost all of them.").

¹⁷⁶ Comcast Exhs. 151, 160, 161, 162, 163, 170, 171; Comcast Exh. 77 (Egan
Written Direct) ¶¶ 44-45 (Comcast subscribers had access to more than 2,000 hours of
Grand Slam tennis coverage in 2010 on CBS, NBC, ESPN, ESPN2, and ESPN3.).

¹⁷⁷ [REDACTED]

[REDACTED] (Comcast Exh. 482).

[REDACTED] (Comcast Exh. 539).

Open, and airs no live coverage of Wimbledon.¹⁷⁸ Moreover, Tennis Channel already had acquired its rights to Wimbledon, the French Open, and the Australian Open by July 2007 when Comcast declined Tennis Channel's equity-for-carriage offer, which Mr. Solomon testified did not constitute discrimination.¹⁷⁹

B. Fundamental Differences Between Tennis Channel and Both Golf Channel and Versus Account for Why All Major MVPDs Carry Golf Channel and Versus More Broadly

73. Despite some superficial similarities, particularly between Tennis Channel and Golf Channel, there are fundamental differences between Tennis Channel and both Golf Channel and Versus that account for why all major MVPDs carry Golf Channel and Versus more broadly than Tennis Channel. Those differences were demonstrated by, among other evidence, the credible testimony of independent industry experts with decades of experience – Mike Egan (cable industry) and Marc Goldstein (advertising industry) – and by candid descriptions of the networks and their audiences in internal Tennis Channel documents that contradict its own experts' testimony.

1. Golf Channel and Versus were launched in a different era

74. When Golf Channel and Versus were launched in 1995, neither Tennis Channel nor sports tiers existed,¹⁸⁰ and it was far easier for a cable network to gain broad

¹⁷⁸ Comcast Exh. 723; Solomon Cross, Apr. 25, 2011 Tr. 442:21-443:4; Comcast Exh. 77 (Egan Written Direct) ¶ 44. As reflected in an internal Tennis Channel document, one of Tennis Channel's investors conceded that he [REDACTED] (Comcast Exh. 89).

¹⁷⁹ Comcast Exhs. 66, 164; Solomon Cross, Apr. 25, 2011 Tr. 457:11-16.

¹⁸⁰ Bond Direct, Apr. 29, 2011 Tr. 1949:9-1950:17, 1969:5-1971:9; Egan Direct, Apr. 28, 2011 Tr. 1595:1-9.

distribution than when Tennis Channel launched in 2003.¹⁸¹ Strong incentives for cable companies to add programming in the mid-1990s resulted from the relaxation of cable rate regulations and new competition from satellite providers.¹⁸² During that time period, channels such as SyFy, History Channel, Fox News Channel, MSNBC, ESPN2, Golf Channel and OLN (now Versus) all launched and gained distribution on widely penetrated tiers.¹⁸³ The broad distribution that Golf Channel and Versus now enjoy was earned over the course of more than fifteen years, including through hundreds of millions of dollars of distribution incentives paid, in aggregate, to Comcast and other distributors.¹⁸⁴

75. In contrast, it was a much more difficult environment to obtain broad carriage when Tennis Channel launched in 2003. As a result of the influx of new cable networks in the 1990s, distributors' programming costs – and, as a result, retail rates to subscribers – had increased significantly.¹⁸⁵ At the same time, heightened competition from satellite companies and new entrants AT&T and Verizon restrained distributors'

¹⁸¹ Comcast Exh. 75 (Bond Written Direct) ¶¶ 29-30; Bond Direct, Apr. 29, 2011 Tr. 1952:9-1954:2, 1969:5-1970:4; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-15.

¹⁸² Bond Direct, Apr. 29, 2011 Tr. 1951:1-1952:22; Comcast Exh. 77 (Egan Written Direct) ¶ 12.

¹⁸³ Bond Direct, Apr. 29, 2011 Tr. 1952:9-1954:2; Comcast Exh. 77 (Egan Written Direct) ¶ 12; *see also* Orszag Direct, Apr. 27, 2011 Tr. 1223:9-1224:16.

¹⁸⁴ Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:7; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28-29; Bond Direct, Apr. 29, 2011 Tr. 1962:5-10; *see also* Comcast Exh. 77 (Egan Written Direct) ¶ 13.

¹⁸⁵ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15; *see supra* ¶ 15; *see also* Solomon Direct, Apr. 25, 2011 Tr. 258:5-11 (testifying that eight years is a “long time” by the “cable business standard”).

ability to continue to add programming and to pass those increased costs along to subscribers.¹⁸⁶

76. In light of those challenges, a number of distributors, including Comcast and Time Warner Cable, created sports tiers (and other specialized tiers of service) which allowed networks that might not be carried at all to be distributed to those customers that wanted them most.¹⁸⁷ Sports tiers allow distributors to add incremental programming without having to pass along increased programming costs to all subscribers.¹⁸⁸ Tennis Channel took advantage of the development of sports tiers to gain distribution by Comcast and other large cable companies.¹⁸⁹

77. Tennis Channel argues that Comcast's addition of the Major League networks – NBA TV, NHL Network and MLB Network – to its D1 tier in 2009 shows that it was not harder for networks launched in the 2000s to obtain broad distribution if they were affiliated with Comcast.¹⁹⁰ Contrary to that argument, however, the examples of the Major League networks highlight the price concessions and compelling content that were required for a network to obtain D1 distribution for the first time in 2009.¹⁹¹ Tennis Channel has not attempted to show that it is substantially similar to any of the Major League networks. Nor has Tennis Channel rebutted Comcast's showing that its

¹⁸⁶ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15.

¹⁸⁷ Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9.

¹⁸⁸ Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9.

¹⁸⁹ *See supra* ¶¶ 16-19.

¹⁹⁰ Tennis Channel Opening, Apr. 25, 2011 Tr. 126:2-128:14.

¹⁹¹ *See supra* ¶¶ 61-65.

respective decisions to carry those networks on D1 were each based on legitimate business reasons.¹⁹²

2. *Tennis Channel is not similar to Golf Channel or Versus in terms of subscriber demand*

78. Tennis Channel is not similar to Golf Channel or Versus in terms of the intensity of subscriber demand for each network. As Comcast's fact witnesses testified – and its expert witnesses Mike Egan and Jonathan Orszag corroborated – MVPDs consider, when making carriage decisions, the extent to which carriage of a network can retain existing subscribers or attract new subscribers.¹⁹³

79. As previously found, the uncontroverted evidence shows that there is not significant subscriber demand for Tennis Channel¹⁹⁴ whereas, in contrast, there is significant subscriber demand for Golf Channel and Versus.¹⁹⁵

3. *Tennis Channel's programming content differs significantly from that of Golf Channel and Versus*

80. Mr. Egan, Comcast's programming expert, gave un rebutted testimony – based on systematically viewing hours of each network's programming that he independently selected – that Tennis Channel projects a demonstrably different image, from the perspective of a viewer, than either Golf Channel or Versus projects. Mr. Egan opined that Tennis Channel projects a “hip,” “international,” and “young” image, with

¹⁹² See *supra* ¶¶ 61-65.

¹⁹³ Comcast Exh. 75 (Bond Written Direct) ¶ 32; Rigdon Direct, Apr. 28, 2011 Tr. 1806:3-8; Comcast Exh. 77 (Egan Written Direct) ¶ 8; Egan Cross, Apr. 28, 2011 Tr. 1768:2-1770:9; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 26, 73.

¹⁹⁴ See *supra* ¶¶ 39-40, 47-51.

¹⁹⁵ See *supra* ¶¶ 59-60.

younger, sophisticated, diverse, and often female on-air personalities.¹⁹⁶ In contrast, Golf Channel projects a “calm,” “mature,” and “country club” persona.¹⁹⁷ Mr. Egan testified that, unlike Tennis Channel, Golf Channel’s on-air look is decidedly not “hip” or “risque,” citing the example of Golf Channel announcers sitting in front of a fireplace.¹⁹⁸ Mr. Egan also contrasted Tennis Channel with Versus, testifying that Versus is a “kaleidoscope” covering more than twenty different sports, including the National Hockey League, the Tour de France, cagefighting, hunting and fishing, college football, and skiing and snowboarding.¹⁹⁹ As a general matter, Versus projects a “violent” and “aggressive” image through, among other things, its extensive extreme hunting programming and “wacky, almost MTVish” extreme sports shows, targeting a “younger, male audience,” and rural viewers.²⁰⁰

81. Mr. Egan testified that Tennis Channel’s programming mix is different from Golf Channel’s programming mix. Golf Channel offers more live event coverage than does Tennis Channel,²⁰¹ and virtually all of Golf Channel’s event coverage is exclusive to the Golf Channel.²⁰² In contrast, much of Tennis Channel’s high profile tournament coverage is not exclusive to Tennis Channel, as most of its Grand Slam coverage is either broadcast first on another network, streamed live on the Internet, or

¹⁹⁶ Egan Direct, Apr. 28, 2011 Tr. 1518:14-1519:16, 1520:8-1521:17.

¹⁹⁷ Egan Direct, Apr. 28, 2011 Tr. 1514:12-22, 1527:13-19.

¹⁹⁸ Egan Direct, Apr. 28, 2011 Tr. 1514:12-22, 1518: 2-10.

¹⁹⁹ Egan Direct, Apr. 28, 2011 Tr. 1539:17-1540:1, 1539:22-1546:19.

²⁰⁰ Egan Direct, Apr. 28, 2011 Tr. 1534:17-1539:13.

²⁰¹ Comcast Exh. 77 (Egan Written Direct) ¶¶ 51; Egan Direct, Apr. 28, 2011 Tr. 1560:4-13.

²⁰² Comcast Exh. 77 (Egan Written Direct) ¶¶ 40-43.

both.²⁰³ Tennis Channel has acknowledged internally that the widespread online availability of its events [REDACTED]

[REDACTED]²⁰⁴

82. Mr. Egan further testified that much of Golf Channel’s non-event programming features non-golf celebrities and reality shows, which broadens the network’s appeal beyond hard-core golf fans.²⁰⁵ In contrast, the little non-event programming that Tennis Channel airs – such as the tennis documentary series *Best of 5* and the travel show *Destination Tennis* – relates almost exclusively to tennis, and the celebrities featured in it are famous tennis players like Tracy Austin, Jimmy Connors, and Lindsay Davenport, which does nothing to broaden Tennis Channel’s appeal beyond tennis fans.²⁰⁶ Mr. Egan’s testimony regarding the narrowness of Tennis Channel’s appeal is corroborated by Tennis Channel’s own research, which found that its viewers tend to be [REDACTED]²⁰⁷

83. Mr. Egan testified that much of Tennis Channel’s programming consists of repeated event coverage,²⁰⁸ and that it is not uncommon for Tennis Channel to air the

²⁰³ Comcast Exh. 77 (Egan Written Direct) ¶¶ 42-44; *see, e.g.*, Comcast Exh. 647 (over [REDACTED] of Tennis Channel’s hours in the week of September 13, 2010 consisted of events previously or simultaneously aired on CBS, ESPN2, ESPN3, or USOpen.org).

²⁰⁴ Comcast Exh. 177.

²⁰⁵ Comcast Exh. 77 (Egan Written Direct) ¶¶ 54-56; Egan Direct Apr. 28, 2011 Tr. 1508:13-1516:2 (listing Golf Channel programs featuring Donald Trump, Ray Romano, Charles Barkley, and Mark Wahlberg).

²⁰⁶ Solomon Direct, Apr. 25, 2011 Tr. 263:14-22); Egan Direct, Apr. 28, 2011 Tr. 1516:9; Comcast Exh. 77 (Egan Written Direct) ¶¶ 32-35.

²⁰⁷ Comcast Exh. 184 at TTCCOM_00061856.

²⁰⁸ Egan Direct, Apr. 28, 2011 Tr. 1555:4-1556:3, 1559:18-1560:14. In fact, more than half { [REDACTED] } of Tennis Channel’s event hours consist of events that had

same match at least five times.²⁰⁹ Similarly, much of Tennis Channel’s non-event programming consists of re-runs of episodes that had premiered at least a year before.²¹⁰

84. Mr. Egan testified that Tennis Channel’s programming mix also differs from Versus’s programming mix. Unlike Tennis Channel, Versus covers nearly two dozen sports, including hundreds of live NHL game broadcasts, both regular season and postseason (including two games of the Stanley Cup Finals), college football, professional basketball, IndyCar racing, cagefighting, and the Tour de France.²¹¹ Versus also places significantly more emphasis on non-event programming than Tennis Channel does. Notably, Versus devotes nearly [REDACTED] of its schedule to outdoor programming alone. Its “hooks and bullets” outdoor sports programming includes shows like *Elk Fever*, *Jimmy Houston’s Outdoors*, and the extreme hunting show *Federal Premium Dangerous Game*.²¹²

concluded more than [REDACTED] days earlier, compared to only [REDACTED] for Golf Channel. (Comcast Exh. 77 (Egan Written Direct) ¶ 47).

²⁰⁹ Comcast Exh. 77 (Egan Written Direct) ¶¶ 22-23. Mr. Solomon testified that Tennis Channel would repeat the same taped tennis match seven or eight different times “if it’s a great match . . . that becomes a classic match,” such as a brand-named player in a Grand Slam tournament. (Solomon Direct, Apr. 25, 2011 Tr. 471:1-8). However, Mr. Solomon conceded that Tennis Channel aired a match from a tournament in South Africa featuring two players currently outside of the top forty in the world seven times within two weeks – none of them live. (Comcast Exh. 723; Solomon Cross, Apr. 25, 2011 Tr. 472:4-474:4; *see also* Comcast Exh. 77 (Egan Written Direct) ¶ 22 (listing other examples of matches aired by Tennis Channel multiple times). Tennis Channel counted each of those broadcasts as “anchor event programming,” a term Tennis Channel has used to describe “our best programming.” (Solomon Cross, Apr. 25, 2011 Tr. 526:5-11).

²¹⁰ Comcast Exh. 77 (Egan Written Direct) ¶ 35.

²¹¹ Comcast Exh. 77 (Egan Written Direct) ¶¶ 57-59.

²¹² Comcast Exh. 77 (Egan Written Direct) ¶¶ 57-59; Egan Direct, Apr. 28, 2011 Tr. 1535:7-1536:15, 1537:8-1538:8, 1539:2-13.

4. *Tennis Channel's audience is materially different from Golf Channel's and Versus's audiences*

85. The weight of the evidence, including the credible expert testimony and Tennis Channel's own documents, establishes that there are material differences between Tennis Channel viewers and Golf Channel and Versus viewers. Tennis Channel's own research indicates that less than {REDACTED} of Tennis Channel viewers watch the Golf Channel.²¹³ Because the networks' audiences are different, Tennis Channel successfully pitched {REDACTED} on the grounds that advertising on Tennis Channel {REDACTED} {REDACTED} advertising on Golf Channel.²¹⁴

86. Unlike Tennis Channel, Golf Channel and Versus have overwhelmingly male audiences. Nearly {REDACTED} of Versus viewers are men – the most of any cable network – and nearly {REDACTED} Golf Channel viewers are men, among the highest of all cable networks.²¹⁵ In contrast, only a {REDACTED} of Tennis Channel viewers are men – by far the lowest of any sports network – placing Tennis Channel in the company of “general appeal” networks like WGN and MTV2.²¹⁶ Tennis Channel documents show

²¹³ Comcast Exh. 11 at TTCCOM_00027627; Comcast Exh. 186 at TTCCOM_00062216; Comcast Exh. 230 at TTCCOM_00062364; Comcast Exh. 368 (Herman Dep.) 317:21-319:3.

²¹⁴ Comcast Exh. 11 at TTCCOM_00027627; Herman Cross, Apr. 26, 2011 Tr. 669:22-670:5; Comcast Exh. 368 (Herman Dep.) 323:14-19.

²¹⁵ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86, 89-90; Comcast Exh. 663; Comcast Exh. 51 at TTCCOM_00051436; *see also* Comcast Exh. 215 at TTCCOM_00021827; Comcast Exh. 800 at TTCCOM_00070616-17.

²¹⁶ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86, 89-90; Comcast Exh. 349 (Brooks Dep.) 318:11-16.

that it regularly cited its [REDACTED] in pitches to MVPDs and other companies, including in its 2009 proposal to Comcast.²¹⁷

87. The weight of the reliable evidence does not support Tennis Channel’s claim that its viewers are similar to Golf Channel and Versus viewers in terms of income. Experian Simmons data for the last four quarters for which data is available (fall 2009 through summer 2010) consistently shows that Tennis Channel’s viewers have a [REDACTED] than viewers of Golf Channel and Versus.²¹⁸ In fall 2009, for example, the median household income for Tennis Channel viewers was [REDACTED] that of Golf Channel and Versus [REDACTED] [REDACTED].²¹⁹ Tennis Channel’s own expert, Timothy Brooks, has acknowledged that Experian Simmons is “widely accepted by the industry,”²²⁰ and Tennis Channel relied on older Experian Simmons median household income data in its pleadings,²²¹ its experts’

²¹⁷ Comcast Exh. 180 at TTCCOM_00020724, 20727; Comcast Exh. 21 at TTCCOM_00035272 [REDACTED] (emphasis supplied); Comcast Exh. 24 at TTCCOM_00002270 (noting that networks on the sports tier [REDACTED] Comcast Exh. 127 at TTCCOM_00019131 [REDACTED]); Comcast Exh. 181 at TTCCOM_00022484 [REDACTED]; Comcast Exh. 217 at TTCCOM_00003380 [REDACTED] (emphasis supplied); Comcast Exh. 268 (Ken Solomon explaining that [REDACTED]); Comcast Exh. 290 at TTCCOM_00033319 [REDACTED] Comcast Exh. 589 at TTCCOM_00086182 [REDACTED] (Tennis Channel has [REDACTED] Comcast Exh. 562 [REDACTED] see also Comcast Exh. 517 (Solomon Dep.) 270:21-271:14; Herman Cross, Apr. 26, 2011 623:20-624:12.

²¹⁸ Comcast Exh. 3; Comcast Exh. 77 (Egan Written Direct) ¶¶ 88-89.

²¹⁹ Comcast Exh. 3; Comcast Exh. 77 (Egan Written Direct) ¶¶ 88-90; Egan Cross, Apr. 28, 2011 Tr. 1749:1-18.

²²⁰ Comcast Exh. 349 (Brooks Dep.) 331:10-13.

²²¹ Tennis Channel Exh. 18 (Complaint) ¶ 58.

written testimony,²²² and its presentations to MVPDs and advertisers (including in its 2009 proposal to Comcast).²²³ When newer Experian Simmons data showed Tennis Channel [REDACTED] Golf Channel and Versus in terms of viewer income, however, Tennis Channel switched to other sources of data (Mendelsohn and MRI) portraying Tennis Channel more favorably.²²⁴ Given Tennis Channel’s history of relying on Experian Simmons and the consistency of Experian Simmons data over the last four quarters, however, the Experian Simmons data from fall 2009 through summer 2010 should be accorded significant weight.²²⁵ Under these circumstances, the weight of the reliable evidence does not support Tennis Channel’s claim that its viewer income is similar to Golf Channel’s or Versus’s.

88. According to data on viewer age included among Mr. Brooks’s “relied upon” materials but not cited in his written testimony, Tennis Channel’s viewers are older than those of Versus and approximately ten years younger than those of Golf Channel, which, with a median viewer age of [REDACTED] has one of the oldest audiences in cable television.²²⁶

²²² Tennis Channel Exh. 16 (Singer Written Direct) ¶ 28 n. 46; Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 33 n.24.

²²³ Comcast Exh. 180 at TTCCOM_00020725; *see also* Comcast Exhs. 11, 292.

²²⁴ *See* Tennis Channel Trial Brief at 10; Tennis Channel Exh. 17 (Brooks Written Direct) ¶¶ 31-33, 42-44. The Mendelsohn data cited by Tennis Channel and Mr. Brooks is skewed substantially by the fact that it is based on a survey only of homes with household incomes exceeding \$100,000. (Comcast Exh. 77 (Egan Written Direct) ¶ 84).

²²⁵ Comcast Exh. 3.

²²⁶ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86-87, 89-90; Comcast Exh. 11 at TTCCOM_00027627 [REDACTED]; Goldstein Direct, May 2, 2011 Tr. 2756:10-2757:4 (“Versus and, in fact, the NHL is one of the youngest skewing male oriented networks that we’ve got.”); *see also* Comcast Exh. 230 at TTCCOM_00062366 [REDACTED]

5. *Advertisers do not view Tennis Channel as being substantially similar to Golf Channel or Versus*

89. As Mr. Goldstein credibly opined based on his decades of experience in the advertising industry, advertisers view networks broadcasting different sports differently, because each sport delivers a unique audience.²²⁷ Since most advertisers use sports programming as a way to reach male viewers, Tennis Channel's relatively even gender balance²²⁸ makes the network fundamentally different than the male-skewing Golf Channel and Versus networks from the perspective of advertisers.²²⁹ Tennis Channel's own documents corroborate that testimony. An internal Tennis Channel document shows that the network's former head of advertising sales realized, soon after starting at Tennis Channel, that the significant [REDACTED] of Tennis Channel's audience was a [REDACTED].²³⁰ Other Tennis Channel documents show that the network pitches itself as a [REDACTED] and as [REDACTED] because of its female viewership.²³¹

90. Mr. Goldstein also testified credibly and without contradiction that advertisers also consider the popularity of a sport on television generally, and the primary sports broadcast on Golf Channel and Versus are more popular than tennis, as evidenced

[REDACTED]); Comcast Exh. 216 at TTCCOM_00019368; Comcast Exh. 589 at TTCCOM_00086182).

²²⁷ Comcast Exh. 79 (Goldstein Written Direct) ¶ 19; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 53-54, 63-64.

²²⁸ *See supra* ¶ 86.

²²⁹ Comcast Exh. 79 (Goldstein Written Direct) ¶ 34; Goldstein Direct, May 2, 2011 Tr. 2685:9-18.

²³⁰ Comcast Exh. 559 at TTCCOM_00087674.

²³¹ Comcast Exh. 476 at TTCCOM_00024295; Comcast Exh. 351 at TTCCOM_00042505; Comcast Exh. 352 at TCCOM_00035238; Comcast Exh. 186 at TTCCOM_00062216.

by their ratings on broadcast television.²³² Interest in televised tennis, already limited, is declining, evidenced by the fact that each of the four Grand Slams recently experienced record low or near-record low ratings.²³³ Significantly, Nielsen dropped tennis from its list of major sports in its 2011 annual year in sports review.²³⁴

91. To attempt to demonstrate that advertisers view the three networks as similar, Tennis Channel relied on supposed overlap in advertisers.²³⁵ As Mr. Goldstein testified, however, advertising overlap between networks does not demonstrate that advertisers view the networks as being similar, since advertisers often purchase time on different networks to reach entirely different audiences.²³⁶ Beyond this fundamental flaw, Tennis Channel's analysis suffers from three additional flaws, as demonstrated during the cross-examination of Mr. Gary Herman, Tennis Channel's current head of advertising sales. First, Tennis Channel excluded makers of golf and tennis equipment and other companies most likely to advertise on the networks (so-called endemic advertisers). Mr. Herman conceded that excluding those advertisers inflated the number of overlapping advertisers identified by Tennis Channel.²³⁷ Second, Tennis Channel ignored the actual advertising data produced by the parties, relying instead on Nielsen

²³² Comcast Exh. 79 (Goldstein Written Direct) ¶¶ 23-32, 43; Comcast Exh. 80 (Orszag Written Direct) ¶ 33; Comcast Exh. 77 (Egan Written Direct) ¶ 37.

²³³ Comcast Exh. 79 (Goldstein Written Direct) ¶ 25.

²³⁴ Comcast Exh. 79 (Goldstein Written Direct) ¶ 25; Comcast Exhs 198, 218.

²³⁵ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 29; Tennis Channel Exh. 15 (Herman Written Direct) ¶¶ 7-10.

²³⁶ Comcast Exh. 79 (Goldstein Written Direct) ¶ 40; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 63-64.

²³⁷ Herman Cross, Apr. 26, 2011 Tr. 661:10-22, 662:1-5; Comcast Exh. 368 (Herman Dep.) 250:14-23; *see also* Comcast Exh. 559 at TTCCOM_00087675 (noting the importance of [REDACTED])

AdViews estimates, which report only at the parent company level. The resulting overlap among large, multi-brand advertisers that buy time on the three networks is especially meaningless because, as Mr. Goldstein explained, multi-brand companies “target entirely different audiences.”²³⁸ Third, Mr. Herman testified that Tennis Channel includes in its “overlap” analysis advertisers that it had pitched since 2009 but that never advertised on Tennis Channel.²³⁹ Further, Mr. Herman acknowledged that Tennis Channel has been preparing its case against Comcast since at least early 2009, which – together with Tennis Channel’s inclusion of failed pitches in its overlap analysis – gave Tennis Channel an incentive to pitch advertisers that would not advertise on Tennis Channel.²⁴⁰ In fact, Mr. Herman conceded at his deposition that during this period Tennis Channel pitched advertisers that it knew would not advertise on the network.²⁴¹

92. Tennis Channel shares only a small number of actual advertisers with Golf Channel and Versus.²⁴² Among each network’s top fifty advertisers in 2010, only {REDACTED} advertisers overlapped between Tennis Channel and Golf Channel, and only

²³⁸ Comcast Exh. 79 (Goldstein Written Direct) ¶ 39; Goldstein Direct, May 2, 2011 Tr. 2688:11-19 (advertisers buy “20 to 30 networks deep,” and so “I would expect there to be a certain amount of overlap”).

²³⁹ Tennis Channel Exh. 15 (Herman Written Direct) ¶¶ 8-9.

²⁴⁰ Herman Cross, Apr. 26, 2011 Tr. 662:20-663:19; Comcast Exh. 368 (Herman Dep.) 170:2-20. By excluding endemic advertisers and ignoring the actual advertising data produced by the parties, Tennis Channel has significantly inflated the degree of actual advertising overlap. Tennis Channel claims that {REDACTED} of Golf Channel’s top thirty advertisers in 2010 had also purchased advertising on Tennis Channel since 2009. (Tennis Channel Exh. 15 (Herman Written Direct) Exh. B, at 1). When the actual advertising data for 2010 is used and when endemic advertisers are included, Golf Channel and Tennis Channel only share {REDACTED} of Golf Channel’s top thirty advertisers. (*Compare* Comcast Exh. 211 at TTCCOM_00005162, *with* Comcast Exh. 212 at COMTTC_00046199).

²⁴¹ Comcast Exh. 368 (Herman Dep.) 132:3-6, 139:15-21, 244:2-247:2.

²⁴² Herman Cross, Apr. 26, 2011 Tr. 667:8-15, 669:4-11.

{ [REDACTED] } overlapped between Tennis Channel and Versus.²⁴³ Even if advertiser overlap were a meaningful metric of similarity, Tennis Channel shares more common advertisers with news and lifestyle networks than it shares with Golf Channel, Versus, and other sports networks.²⁴⁴

6. *Tennis Channel's programming costs are substantially less than Golf Channel's or Versus's programming costs*

93. Comcast's economic expert, Mr. Jonathan Orszag, opined that programming cost is a proxy, albeit imperfect, for the viewer appeal and quality of sports content. Mr. Orszag testified that programming costs consist primarily of the cost of acquiring rights to programming, and that the market price of those programming rights will reflect the value of the programming to interested networks.²⁴⁵ According to Kagan – a firm whose data provides a consistent basis for comparing programming costs across networks – Golf Channel spent \$167 million on its programming, while Versus spent \$289 million in 2010.²⁴⁶ In contrast, Tennis Channel spent \$39 million on its programming in 2010 – less than almost any other national sports network.²⁴⁷ In internal documents, Tennis Channel has characterized its Grand Slam coverage as { [REDACTED] }

²⁴³ Comcast Exh. 211; Comcast Exh. 212; Comcast Exh. 213; Comcast Exh. 665.

²⁴⁴ For example, more of Tennis Channel's top thirty advertisers in 2010 advertised on [REDACTED] than they did on Golf Channel. (Comcast Exh. 801). Similarly, more of those same top thirty advertisers advertised on [REDACTED] than on Versus. (Comcast Exh. 801; Herman Cross, Apr. 26, 2011 Tr. 650:4-651:8, 652:3-653:13).

²⁴⁵ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 36-40; Orszag Cross, Apr. 27, 2011 Tr. 1452:16-1453:18.

²⁴⁶ Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 1101; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65.

²⁴⁷ Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 1101; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65.

[REDACTED]²⁴⁸ In fact, Tennis Channel pays [REDACTED] for the Australian Open – one of the four premier tennis events.²⁴⁹ Tennis Channel pays [REDACTED] for any of the non-Grand Slam tournaments it airs.²⁵⁰ Mr. Orszag opined that Tennis Channel’s programming expenditures reflect the limited market value of tennis programming rights. That opinion is corroborated by Tennis Channel’s acknowledgment, in an internal document, that it pays no rights fee for the majority of non-Grand Slam tournaments because there is [REDACTED] to air them on television.²⁵¹

7. *Golf Channel and Versus have significantly higher ratings*

94. As an initial matter, Tennis Channel places undue emphasis on ratings. Mr. Egan, an experienced cable programming executive, testified credibly that ratings are not typically a material consideration in an MVPD’s carriage decisions.²⁵² As discussed above, what is important to MVPDs is the intensity of subscriber demand for a network, which leads to the retention and attraction of MVPD subscribers,²⁵³ and ratings do not measure intensity of demand.²⁵⁴

²⁴⁸ Comcast Exh. 127; Solomon Cross, Apr. 25, 2011 Tr. 441:5-21.

²⁴⁹ Comcast Exh. 127.

²⁵⁰ Comcast Exh. 127; *see also* Comcast Exh. 624, Comcast Exh. 517 (Solomon Dep.) 79:23-80:7; Solomon Cross, Apr. 25, 2011 Tr. 440:10-14.

²⁵¹ Comcast Exh. 624; *see also* Comcast Exh. 127; Comcast Exh. 517 (Solomon Dep.) 79:23-80:7; Solomon Cross, Apr. 25, 2011 Tr. 440:8-14.

²⁵² Comcast Exh. 77 (Egan Written Direct) ¶¶ 7, 25; Egan Cross, Apr. 28, 2011 Tr. 1767:18-1773:6.

²⁵³ *Supra* ¶¶ 78-79.

²⁵⁴ Egan Cross, Apr. 28, 2011 Tr. 1768:2-1770:9 (“[A] cable company or a satellite company is in a subscription business. [W]hat they are all about is maintaining, retaining, and acquiring customers. And ratings don’t speak to that.”); *see also* Tennis Channel Exh. 139 (Bond Dep.) at 29:19-24 (“Ratings information can show how many

95. Regardless, the Nielsen local market ratings (i.e., ratings calculated and reported by Nielsen) for Golf Channel and Versus are significantly higher than for Tennis Channel.²⁵⁵

96. The non-Nielsen ratings used by Tennis Channel’s expert, Timothy Brooks, are an unreliable basis for comparison. Mr. Brooks did not rely on ratings calculated or reported by Nielsen, but instead relied exclusively on ratings calculated by Tennis Channel, including by Tennis Channel employees with a financial stake in this litigation.²⁵⁶ It is relevant that, as evidenced by internal Tennis Channel documents, Tennis Channel employees previously inflated the network’s ratings projections.²⁵⁷

97. Tennis Channel’s method for calculating the ratings used by Mr. Brooks inflates Tennis Channel’s ratings. All of the ratings calculated by Tennis Channel are “coverage area ratings,” which inflate Tennis Channel’s ratings relative to total market ratings calculated and published by Nielsen.²⁵⁸ Tennis Channel’s use of “coverage area

folks are viewing a particular program, but it doesn’t necessarily mean that it’s a valuable service to customers or that they value it in the context of their subscription service.”); Tennis Channel Exh. 138 (Orszag Dep.) at 206:21-207:02 (“Ratings . . . measure viewership but not the intensity of the viewership. And what MVPDs care about [is] whether people will switch.”).

²⁵⁵ Comcast Ex. 152; Comcast Ex. 77 (Egan Written Direct) ¶ 69 n.58. Tennis Channel’s ratings cannot be compared using Nielsen national ratings, because Tennis Channel does not purchase them. (Brooks Cross, Apr. 26, 2011 Tr. 724:12-18).

²⁵⁶ Brooks Cross, Apr. 26, 2011 Tr. 726:2-11; Comcast Ex. 349 (Brooks Dep.) 13:8-14:5, 14:23-15:13 (testifying that he relied on Tennis Channel to “pull the [ratings] data for each separate market . . . put all of that information onto spreadsheets, weight it properly by market and market size and distribution by market, and combine it into a single number”).

²⁵⁷ *See supra* ¶ 20 n.38.

²⁵⁸ Brooks Cross, Apr. 26, 2011 Tr. 732:6-733:20; Comcast Ex. 349 (Brooks Dep.) 190:12-22 (testifying that the local market ratings for Tennis Channel calculated and reported by Nielsen on a total market basis are “much lower” than ratings for Tennis Channel calculated by Tennis Channel on a “coverage area” basis). Nielsen does not

ratings” also inflates Tennis Channel’s ratings relative to ratings for Golf Channel and Versus. The denominator for a “coverage area rating” is “all homes that can receive that cable network,” and because Tennis Channel reaches significantly fewer homes than either Golf Channel or Versus reaches, Tennis Channel uses a significantly smaller denominator in calculating ratings for itself than it uses in calculating ratings for Golf Channel and Versus.²⁵⁹ Because ratings are a fraction, the use of a smaller denominator for Tennis Channel than for Golf Channel or Versus inflates Tennis Channel’s ratings relative to ratings for Golf Channel and Versus.²⁶⁰ Nielsen has warned that “the coverage area rating for one cable network cannot be compared to another cable network’s coverage area rating.”²⁶¹ Under these circumstances, Mr. Brooks’s use of “coverage area ratings” to compare the three networks is unreliable.

8. *There is no meaningful competition between Tennis Channel and Golf Channel or Versus for programming rights*

98. Tennis Channel did not meaningfully compete for programming rights with Golf Channel or Versus during the relevant time period. There is no competition for programming rights and no programming overlap between Golf Channel and Tennis Channel.²⁶² There is no programming overlap between Tennis Channel and Versus, as

calculate or publish “coverage area ratings” for local markets. As Mr. Brooks testified, Nielsen does not calculate “coverage area ratings” on “a local market basis,” “[s]o if you want a coverage area rating for a local market, you would never turn to Nielsen to do it. I’ve never heard of anybody who did.” (Comcast Exh. 349 (Brooks Dep.) 184:19-185:18).

²⁵⁹ Brooks Cross, Apr. 26, 2011 Tr. 727:2-6; Comcast Exh. 349 (Brooks Dep.) 70:20-23; *see also* Joint Glossary, “Coverage Area Rating.”

²⁶⁰ Brooks Cross, Apr. 26, 2011 Tr. 726:14-730:7.

²⁶¹ Comcast Exh. 911; *see also* Brooks Cross, Apr. 26, 2011 Tr. 740:6-745:12.

²⁶² Comcast Exh. 363 (Singer Dep.) 241:16-242:18.

Versus does not air any tennis programming.²⁶³ Although Versus at one time carried a small amount of tennis, it stopped airing tennis programming because it lost money on tennis.²⁶⁴

99. The very limited extent to which Versus ever considered acquiring any tennis programming rights occurred significantly before and after Tennis Channel's 2009 proposal at issue in this litigation.²⁶⁵ Versus considered acquiring rights to the U.S. Open in late 2006 at the urging of Ken Solomon, Tennis Channel's Chairman and Chief Executive Officer.²⁶⁶ On December 10, 2006, Mr. Solomon e-mailed Jeff Shell, then Comcast's head of programming, to propose a transaction in which Tennis Channel and Versus would [REDACTED] try to get U.S. Open rights from the United States Tennis Association ("USTA") and Tennis Channel would grant Comcast equity in exchange for additional distribution.²⁶⁷ Comcast briefly considered such a three-party deal internally, including a slight variation in which Comcast would use Tennis Channel equity – which would be granted to Comcast under the equity-for-carriage leg of the proposed deal – as consideration for U.S. Open rights, in order to reduce the rights fee that the USTA would demand, but ultimately did not pursue Mr. Solomon's proposed transaction.²⁶⁸

²⁶³ Comcast Exh. 517 (Solomon Dep.) 162:3-10; Tennis Channel Exh. 143 (Shell Dep.) 142:15-143:3; Comcast Exhs. 192, 193, 194.

²⁶⁴ Comcast Exh. 253; Tennis Channel Exh. 143 (Shell Dep.) 142:19-143:7.

²⁶⁵ Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 42; Tennis Channel Exh. 143 (Shell Dep.) 20:23-21:12, 142:2-22; Comcast Exhs. 253, 666.

²⁶⁶ Comcast Exh. 666.

²⁶⁷ Comcast Exh. 666.

²⁶⁸ Tennis Channel Exhs. 32, 34; Donnelly Direct, May 2, 2011 Tr. 2523:5-2525:5, 2531:14-18; Tennis Channel Exh. 143 (Shell Dep.) 23:21-24:16, 24:19-25:9, 31:7-10.

100. In 2007, Versus and ESPN each separately sought the cable rights to the U.S. Open formerly held by the USA Network.²⁶⁹ As Mr. Orszag opined, given that ESPN was a bidder for the U.S. Open rights, it is highly unlikely that Tennis Channel had any effect on the competition for those rights.²⁷⁰ In fact, Tennis Channel [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷¹

101. ESPN acquired the cable rights to the U.S. Open, and sublicensed a small number of early-round hours to Tennis Channel.²⁷² [REDACTED]

[REDACTED]

[REDACTED]²⁷³ Versus did not compete for the smaller, less desirable U.S. Open package currently sublicensed by Tennis Channel from ESPN.

Versus considered acquiring USA Network's former package of rights that consisted of

[REDACTED]

[REDACTED] including live coverage of the tournament's later rounds.²⁷⁴ ESPN

²⁶⁹ Tennis Channel Exh. 40.

²⁷⁰ Comcast Exh. 80 (Orszag Written Direct) ¶ 65.

²⁷¹ Comcast Exh. 89 [REDACTED]

[REDACTED] Comcast Exhs. 302, 666.

²⁷² Comcast Exhs. 160, 539; Comcast Exh. 517 (Solomon Dep.) 348:19-350:18.

²⁷³ Comcast Exhs. 482, 539.

²⁷⁴ Tennis Channel Exh. 40 at COMTTC_00011540; Tennis Channel Exh. 143 (Shell Dep.) 21:23-22:15.

currently carries approximately 100 hours of U.S. Open coverage, including 92 hours of live and same-day delayed match coverage.²⁷⁵

102. NBCUniversal's pursuit of Wimbledon rights, which may or may not become available, for Versus is irrelevant to determining whether Comcast discriminated in 2009 or whether Versus was similarly situated to Tennis Channel in 2009 – significantly before Versus became affiliated with NBCU.²⁷⁶ Regardless, the evidence that Comcast did not consider Versus in rejecting Tennis Channel's 2009 proposal is uncontroverted.²⁷⁷

C. Dr. Hal Singer's Opinions and Analyses Raise Serious Questions About Their Validity, Reliability and Bias

103. As set forth below, Dr. Singer's testimony as to several material issues raises serious questions as to the validity, reliability and bias of his opinions and analysis.

1. Dr. Singer's analysis of the Major League networks raises serious questions of reliability and independence

104. Dr. Singer's testimony regarding Comcast's carriage of the Major League networks was inconsistent with his prior testimony in the *NFL v. Comcast* case, exposed as unreliable on cross-examination, and contradicted by unrebutted fact evidence.²⁷⁸

105. In the *NFL v. Comcast* case, Dr. Singer supported the NFL's litigation position by testifying that NBA TV *was not* affiliated with Comcast (and that, as a result,

²⁷⁵ Comcast Exh. 160; Comcast Exh. 77 (Egan Written Direct) ¶ 45.

²⁷⁶ Colloquy, Apr. 27, 2011 Tr. 1415:16-1416:2.

²⁷⁷ Bond Direct, Apr. 29, 2011 Tr. 2127:3-11; Comcast Exh. 78 (Gaiski Written Direct) ¶ 12; Comcast Exh. 130; Comcast Exh. 588.

²⁷⁸ See *NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, MB Docket No. 08-214; Comcast Exh. 1048 at ¶ 80 Table 1.

Comcast “relegated” it to its sports tier).²⁷⁹ In this case, Dr. Singer supported Tennis Channel’s litigation position by testifying to the opposite – namely, that NBA TV *was* affiliated with Comcast (and, for that reason, Comcast melted the network from the sports tier to D1) – even though he admitted there was no change in Comcast’s relationship to NBA TV.²⁸⁰ That contradictory testimony, which mirrors the respective litigation positions of Dr. Singer’s clients, raises a serious question of independence.

106. In his testimony, Dr. Singer advanced a “natural experiment,” which he described as follows: When three Major League networks “were not affiliated with Comcast . . . we got to see how Comcast treated them when they were not affiliated. And then we had a period of time in which they were affiliated with Comcast, and we got to see how Comcast treated them after they were affiliated.”²⁸¹ But none of the networks support Dr. Singer’s testimony that the experiment demonstrates discrimination. First, Dr. Singer initially used NBA TV in his “experiment,” but abandoned it during his deposition after realizing that it did not show discrimination.²⁸² Second, Dr. Singer conceded on cross-examination that under his definition of affiliation, NHL Network was affiliated with Comcast both before and after it was melted from the sports tier to D1.²⁸³ Third, Dr. Singer acknowledged that Comcast distributed MLB Network on D1 and owned a minority interest in MLB Network since its launch, so there was never a time

²⁷⁹ Comcast Exh. 1048 at ¶ 80 Table 1; Singer Cross, Apr. 26, 2011 Tr. 933:21-937:12, 938:18-939:9.

²⁸⁰ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 20.

²⁸¹ Singer Direct, Apr. 26, 2011 Tr. 853:5-14; Tennis Channel Exh. 16 (Singer Written Direct) ¶¶ 20, 74.

²⁸² Comcast Exh. 363 (Singer Dep.) 366:14-367:3.

²⁸³ Singer Cross, Apr. 26, 2011 Tr. 943:9-14, 946:5-16, 949:18-21.

that Comcast's affiliation with MLB Network or its distribution of MLB Network changed.²⁸⁴

107. Dr. Singer's expert testimony regarding the Major League networks also is inconsistent with the unrebutted fact testimony showing that Comcast's carriage of those networks was based on legitimate business reasons.²⁸⁵

108. For all of these reasons, Dr. Singer's testimony regarding the Major League networks is not credible.

2. *Dr. Singer improperly relied on analyses prepared by Tennis Channel*

109. Dr. Singer repeatedly relied on information provided by, and analysis conducted by, Tennis Channel and its counsel, without any attempts to verify or confirm their accuracy. Dr. Singer's "anchor event" analysis was prepared by Tennis Channel,²⁸⁶ which created the "raw data" as well as the categories used to organize it.²⁸⁷ Dr. Singer admitted that he did not do any independent investigation of the data, explaining that he "was taking a document that [Tennis Channel] had already created."²⁸⁸ Dr. Singer also relied on an advertiser overlap analysis prepared by Tennis Channel as the basis for his opinion that advertisers view Tennis Channel as being similar to Golf Channel and Versus. Dr. Singer explained that he was "taking [Tennis Channel] at their word . . . I

²⁸⁴ Singer Cross, Apr. 26, 2011 Tr. 952:8-16.

²⁸⁵ See *supra* ¶¶ 61-65.

²⁸⁶ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 52; Comcast Exh. 363 (Singer Dep.) 299:8-300:22.

²⁸⁷ Comcast Exh. 363 (Singer Dep.) 299:8-300:22.

²⁸⁸ Comcast Exh. 363 (Singer Dep.) 299:24-300:22.

confess to that.”²⁸⁹ Because Dr. Singer relied on “anchor event” and advertiser overlap analyses prepared by Tennis Channel, a party in this litigation, rather than his own independent analyses, his testimony based on those analyses is not credible.

3. *The evidence showed that Dr. Singer’s attempt to replicate the FCC staff’s analysis is not credible, and suffers from the same flaws that have led Dr. Singer’s previous analyses to be rejected as biased*

(a) Dr. Singer acknowledged that he did not replicate the FCC staff’s analysis

110. Dr. Singer testified that he replicated the FCC Staff’s analysis described in the Technical Appendix to the Commission’s order approving the Comcast/NBCU transaction, an analysis based on the model developed by Professor Austan Goolsbee.²⁹⁰ The evidence shows, however, that Dr. Singer’s analysis departed extensively from that of the FCC staff, and raises serious questions about its validity and bias.

111. Dr. Singer’s conclusion that Comcast discriminated against Tennis Channel for anticompetitive reasons was based on a simple comparison of sample means.²⁹¹ But in the paper setting forth the framework that Dr. Singer purports to replicate, Professor Goolsbee expressly warned against comparing sample means and wrote that “[w]hat is needed is a multivariate regression framework.”²⁹² When Dr. Singer conducted a multivariate regression analysis “as a sensitivity test,” it showed that

²⁸⁹ Comcast Exh. 363 (Singer Dep.) 226:5-25; Tennis Channel Exh. 16 (Singer Written Direct) ¶ 29.

²⁹⁰ Tennis Channel Exh. 16 (Singer Written Direct) ¶¶ 23-25.

²⁹¹ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 25.

²⁹² Austan Goolsbee, “Vertical Integration and the Market for Broadcast & Cable Television Programming,” (Apr. 2007) at 27-28.

when income is considered among the potential explanatory factors, there is no statistically significant support for his conclusion.²⁹³

112. On direct examination, Dr. Singer testified that his analysis duplicated the FCC Staff’s analysis.²⁹⁴ On cross-examination, however, Dr. Singer acknowledged that “I didn’t do everything exactly the way the FCC did. I had a different database. I had a different methodology.”²⁹⁵ Dr. Singer admitted that while the FCC Staff focused on “changes in the degree of favoritism,” he “was looking at the opposite.”²⁹⁶ Dr. Singer also testified that that the FCC staff’s findings applied specifically to Golf Channel and Versus.²⁹⁷ But the Technical Appendix shows that although the FCC staff analyzed Versus and Golf Channel together with the G4 and Style networks, the staff never separately analyzed Versus, Golf Channel or both networks together.²⁹⁸

(b) As in the Dish Network arbitration, Dr. Singer inappropriately weighted data points

113. Dr. Singer has testified against Comcast in six different proceedings in the last five years, most recently in a 2010 program access arbitration proceeding in which he testified on behalf of Dish Network.²⁹⁹ In that case, Dr. Singer purported to calculate a median penetration level for all regional sports networks on Dish Network. In calculating

²⁹³ Singer Cross, Apr. 27, 2011 Tr. 1148:3-8; Tennis Channel Exh. 16 (Singer Written Direct) ¶ 25 n.28; Singer Cross, Apr. 27, 2011 Tr. 1086:2-22.

²⁹⁴ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 23; Singer Direct, Apr. 26, 2011 Tr. 859:20-860:1.

²⁹⁵ Singer Cross, Apr. 27, 2011 Tr. 1043:2-4.

²⁹⁶ Singer Redirect, Apr. 27, 2011 Tr. 1169:13-20.

²⁹⁷ Tennis Channel Exh. 16 (Singer Written Direct) ¶¶ 22-23, 25.

²⁹⁸ Tennis Channel Exh. 13 ¶¶ 68, 70.

²⁹⁹ Tennis Channel Exh. 16 (Singer Written Direct) Appx. 1, 77-78; Singer Direct, Apr. 26, 2011 Tr. 828:4-9; Singer Cross, Apr. 27, 2011 Tr. 1148:9-20; Comcast Exh. 1047.

the median – the point in a data set at which there are the same number of data points above and below – Dr. Singer collapsed a number of data points that were unfavorable to Dish Network into a single data point, thereby decreasing their weight and leading to a more favorable result for Dish Network.³⁰⁰ In his opinion ruling for Comcast, the arbitrator rejected Dr. Singer’s analysis, reasoning that Dr. Singer’s “analyses raised serious questions as to their validity, reliability and bias.”³⁰¹ The arbitrator also listed seven other “questions . . . identified with Dr. Singer’s regression analysis that made it less credible on the issue of fair market value for the programming in question in this proceeding than [Comcast’s expert’s] testimony.”³⁰²

114. As in the Dish Network arbitration, Dr. Singer’s discrimination analysis here relies on improper weighting.³⁰³ Dr. Singer testified that in computing the means of Comcast’s market shares for each DMA, he effectively weighted each DMA’s market share “based on how many head ends showed up in the DMA.”³⁰⁴ That was improper because a weighted mean – also known as a weighted average – is “an average in which each item in the series being averaged is multiplied by a ‘weight’ relevant to its importance.”³⁰⁵ Yet there is no evidence that the number of head ends within a DMA is relevant to the importance of that DMA.³⁰⁶ To the contrary, Comcast has 80 head ends in

³⁰⁰ Comcast Exh. 1047 at 7-8; Singer Cross, Apr. 27, 2011 Tr. 1148:21-1152:14.

³⁰¹ Comcast Exh. 1047 at 8.

³⁰² Comcast Exh. 1047 at 7 & n.17.

³⁰³ *See supra* ¶ 111.

³⁰⁴ Singer Cross, Apr. 26, 2011 Tr. 960:7-961:18, 964:9-10, 965:1-3, 967:14-16, 969:5-970:10.

³⁰⁵ Comcast Exh. 1010; *see also* Joint Glossary, “Weighted Average.”

³⁰⁶ Singer Cross, Apr. 27, 2011 Tr. 1025:10-1026:6, 1026:22-1027:5.

the Boston-Manchester DMA, so Dr. Singer counted the Boston-Manchester DMA 80 times, while, weighting Philadelphia, a DMA with far more subscribers than Boston-Manchester, 39 times, and Houston, one of the largest Comcast markets, only twice.³⁰⁷ Although Dr. Singer initially asserted that weighting by head end was appropriate because “the head end is representing . . . a rough measure of the number of homes or people who are served,”³⁰⁸ he acknowledged that he had no basis to make such an assertion, as he never examined whether a correlation in fact existed between the number of head ends in a DMA and the number of subscribers in the DMA.³⁰⁹

4. *Dr. Singer’s arguments that the carriage decisions of DIRECTV and Dish Network should be given the “greatest weight” have been rejected by the Commission*

115. Dr. Singer opined that DIRECTV and Dish Network “should be given the greatest weight” in analyzing how other MVPDs carry Tennis Channel, while “out-of-region cable operators . . . are less valuable proxies.”³¹⁰ Dr. Singer offered nearly identical testimony as MASN’s expert during the *MASN-TWC* arbitration: “I wouldn’t put as much weight on what those out of region in terms of nonoverlapping territories with respect to Time Warner are doing. The most important proxy is Time Warner’s in region competitor in North Carolina . . . You want to focus on a handful of out of region competitors that don’t compete with Time Warner.”³¹¹

³⁰⁷ Singer Cross, Apr. 26, 2011 Tr. 972:17-975:20; Comcast Exhs. 1055, 1091.

³⁰⁸ Singer Cross, Apr. 27, 2011 Tr. 1026:2-6.

³⁰⁹ Singer Cross, Apr. 27, 2011 Tr. 1026:22-1027:5.

³¹⁰ Tennis Channel Exh. 16 (Singer Written Direct) ¶¶ 54-55.

³¹¹ Comcast Exh. 1020 at 295:5-14; *see also id.* at 296:4-9 (“[T]he best proxy . . . that Time Warner is facing is DIRECTV and [Dish Network] which competes in the very same market that Time Warner is competing in North Carolina.”).

116. Dr. Singer’s opinion was rejected by the Commission, which held that one should review the carriage decisions of all MVPDs,³¹² that Dish Network and DIRECTV were poor proxies for Time Warner Cable,³¹³ and that the carriage decisions of the out-of-region cable distributors “provide independent evidence that [Time Warner Cable] did not engage in discrimination on the basis of affiliation.”³¹⁴

117. In addition, Dr. Singer’s opinion that Dish Network and DIRECTV, which, respectively, own {█} percent and {█} percent of Tennis Channel, are the best proxies for Comcast’s carriage decision with respect to Tennis Channel³¹⁵ conflicts with his own testimony that the satellite companies’ equity-for-carriage agreements with Tennis Channel “would make [them] inclined to give it better treatment,”³¹⁶ “has got to influence the extent to which they carry [Tennis Channel],”³¹⁷ and “would have a significant impact” on their carriage of Tennis Channel.³¹⁸

D. Mr. Timothy Brooks’s Opinions and Analyses Raise Serious Questions About Their Independence and Reliability

1. Mr. Brooks improperly relied on ratings calculated by Tennis Channel, not by Nielsen

118. Mr. Brooks’s ratings comparisons did not rely on ratings calculated and published by Nielsen, an independent source. Instead, those comparisons relied exclusively on “coverage area ratings” calculated by Tennis Channel, including by

³¹² *MASN*, 25 FCC Rcd at 18112 ¶ 18 n. 101.

³¹³ *MASN*, 25 FCC Rcd at 18111-12 ¶ 18 & n.101.

³¹⁴ *MASN*, 25 FCC Rcd at 18111-12 ¶ 18.

³¹⁵ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 54.

³¹⁶ Singer Cross, Apr. 27, 2011 Tr. 1105:2-4.

³¹⁷ Singer Cross, Apr. 27, 2011 Tr. 1110:12-13.

³¹⁸ Singer Cross, Apr. 27, 2011 Tr. 1112:6-8.

Tennis Channel employees (Phil Duddy and Steven Badeau) with a financial stake in this litigation.³¹⁹ Those “coverage area ratings” for Tennis Channel that were calculated by Tennis Channel are inflated.³²⁰ Tennis Channel provided the ratings that it calculated to Mr. Brooks “through [Tennis Channel’s] counsel,” and “virtually all communications between [Mr. Brooks] and Mr. Badeau were conducted through counsel.”³²¹ Mr. Brooks’s reliance on ratings calculated by Tennis Channel (rather than Nielsen), and his failure to communicate directly with the individuals at Tennis Channel who calculated the ratings, raise serious questions of independence.

2. *The record shows that Mr. Brooks’s testimony regarding his ratings comparisons was not reliable*

119. As to several material issues, Mr. Brooks’s testimony regarding his ratings comparisons was shown, on cross-examination, not to be accurate. Those inaccuracies raise serious questions about the reliability of his testimony regarding his ratings comparisons.

120. For example, Mr. Brooks testified that he had compared “the absolute size of the audience” for Tennis Channel, Golf Channel and Versus, and that all three networks had the “same size of audience.”³²² But on cross-examination, Mr. Brooks conceded that the “coverage area ratings” that he used to compare Tennis Channel to

³¹⁹ See *supra* ¶ 96. Mr. Brooks “was told” that “all of the data” that Tennis Channel used to calculate ratings was “from Nielsen,” but he did not check it against data reported by Nielsen. (Comcast Exh. 349 (Brooks Dep.) 143:21-144:15). Instead of verifying the data, Mr. Brooks trusted Mr. Badeau because he has known him “for a very long time.” (Comcast Exh. 349 (Brooks Dep.) 144:16-145:3).

³²⁰ See *supra* ¶ 97.

³²¹ Comcast Exh. 349 (Brooks Dep.) 29:5-30:2, 125:1-21.

³²² Brooks Direct, Apr. 26, 2011 Tr. 704:1-11; Brooks Cross, Apr. 26, 2011 Tr. 819:21-5.

Golf Channel and Versus, do not measure *absolute* audience size.³²³ Instead, “coverage area ratings” measure *relative* audience size – i.e., the size of a particular network’s audience relative to the number of homes “that can receive that cable network.”³²⁴

121. In another example, Mr. Brooks testified that he had compared the audience popularity of Tennis Channel with Versus and Golf Channel “where all can be seen,” meaning “households which have the opportunity to tune into any one of these three networks.”³²⁵ But on cross-examination, Mr. Brooks conceded that his comparison was not based on a sample of households that receive all three networks,³²⁶ but rather on a different sample for each network: homes that receive Tennis Channel, homes that receive Versus and homes that receive Golf Channel.³²⁷

122. In yet another example, Mr. Brooks testified that he had undertaken an analysis of the “top rated events” on Tennis Channel and Golf Channel.³²⁸ But Mr. Brooks conceded on cross-examination that in selecting the events that he included in his analysis of “top rated” events, he “did not care whether or not the events from Golf Channel that [he] selected were, in fact, the highest rated events on Golf Channel.”³²⁹ Instead, he considered only what he and Tennis Channel “believe[d]” would be the

³²³ Brooks Cross, Apr. 26, 2011 Tr. 732:3-734:19.

³²⁴ Brooks Cross, Apr. 26, 2011 Tr. 727:9-19; *see also* Comcast Exh. 349 (Brooks Dep.) 70:12-23.

³²⁵ Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 18; Brooks Cross, Apr. 26, 2011 Tr. 736:3-7.

³²⁶ Brooks Cross, Apr. 26, 2011 Tr. 737:2-18.

³²⁷ Brooks Cross, Apr. 26, 2011 Tr. 739:2-15.

³²⁸ Tennis Channel Exh. 17 (Brooks Written Direct) ¶¶ 20-24.

³²⁹ Comcast Exh. 349 (Brooks Dep.) 193:11-17; *see also* Brooks Cross, Apr. 26, 2011 Tr. 751:8-18.

“highest rated” events, without actually looking at the ratings of all events on Golf Channel in order to learn whether the events he considered were, in fact, the highest rated events.³³⁰ For that reason alone, Mr. Brooks’s analysis of “top rated” events on Tennis Channel and Golf Channel is unreliable. In fact, numerous top-rated events on Golf Channel, as measured by Nielsen national ratings, were omitted from Mr. Brooks’s analysis.³³¹

3. *Tennis Channel’s novel methodology for calculating “coverage area ratings” based on samples combining numerous local markets is unreliable*

123. The weight of the credible evidence shows that, contrary to Mr. Brooks’s testimony,³³² the samples of combined local markets on which Mr. Brooks relied for his ratings comparisons are not representative of the United States as a whole, and that the “coverage area ratings” calculated by Tennis Channel for those local markets cannot be projected to the United States as a whole.³³³

124. Mr. Brooks has acknowledged that “the most important thing” about a sample is “the representativeness of that sample,”³³⁴ and that to be representative a sample must be chosen “randomly representing all parts – all geographies, representing all ethnicities, representing economic levels, representing the diversity, in other words . . . of the population to which you are going to project.”³³⁵ Indeed, that is why Nielsen goes

³³⁰ Brooks Cross, Apr. 26, 2011 Tr. 747:4-19.

³³¹ Comcast Exhs. 924, 931; Brooks Cross, Apr. 26, 2011 Tr. 767:3-772:8.

³³² Tennis Channel Exh. 17 (Brooks Written Direct) ¶¶ 15-16; Comcast Exh. 349 (Brooks Dep.) 167:11-13.

³³³ See Comcast Exh. 77 (Egan Written Direct) ¶¶ 67, 69.

³³⁴ Comcast Exh. 349 (Brooks Dep.) 90:18-91:1.

³³⁵ Comcast Exh. 349 (Brooks Dep.) 90:18-91:18.

“to great lengths to try to ensure that every home in America has an equal chance of being included in their sample in order to establish that representativeness.”³³⁶ The samples consisting of [REDACTED] local markets on which Mr. Brooks relies,³³⁷ however, “are not geographically representative of the total U.S.” because they exclude “large sections and huge populations of the country.”³³⁸ As a result, those samples do not meet Nielsen’s standard “that every U.S. household must have a chance to be selected.”³³⁹

E. The Evidence Shows That Mr. Jonathan Orszag’s Opinions and Analyses Are Impartial and Reliable

125. Mr. Jonathan Orszag testified on behalf of Comcast as an expert in applied microeconomics specializing in communications issues.³⁴⁰ Mr. Orszag’s testimony was independent and impartial. He has served as an expert in proceedings both for Comcast and adverse to Comcast, and has declined to testify on behalf of Comcast in other cases where his opinions and analyses would be contrary to Comcast’s position.³⁴¹ No judge or

³³⁶ Comcast Exh. 349 (Brooks Dep.) 91:1-18; *see also* Comcast Exh. 77 (Egan Written Direct) ¶ 69 (“For example, Nielsen is careful to create a geographically representative national sample. In fact, Nielsen states on its website, ‘To be statistically accurate, it is essential that our samples be randomly selected. Every household in the United States has a chance of being selected, no matter where it is located.’”) (quoting www.nielsen.com/us/en/about-us/nielsenfamilies).

³³⁷ Tennis Channel Exh. 17 (Brooks Written Direct) ¶¶ 27-28.

³³⁸ Comcast Exh. 77 (Egan Written Direct) ¶ 73.

³³⁹ Comcast Exh. 77 (Egan Written Direct) ¶ 73.

³⁴⁰ Tennis Channel Exh. 138 (Orszag Dep.) 38:24-39:2; Orszag Direct, Apr. 27, 2011 Tr. 1205:6-17.

³⁴¹ Orszag Cross, Apr. 27, 2011 Tr. 1260:20-1262:14; Tennis Channel Exh. 138 (Orszag Dep.) 19:25-22:18.

arbitrator has ever stricken Mr. Orszag’s opinions and analyses or rejected them as biased or unreliable.³⁴²

F. The Evidence Shows That Mr. Michael Egan’s Opinions and Analyses Are Impartial and Reliable

126. Mr. Michael Egan testified on behalf of Comcast as an expert in cable television programming.³⁴³ Mr. Egan previously testified as an expert on behalf of Time Warner Cable in the *WealthTV* proceeding,³⁴⁴ and the Presiding Judge determined that Mr. Egan’s testimony was “consistent, convincing, and well organized” and credible.³⁴⁵

127. Mr. Egan served as senior vice president of programming and new product development for Cablevision Industries, then the eighth largest cable company in the United States.³⁴⁶ Mr. Egan also founded and led programming for Renaissance Media Holdings, a cable company that was ultimately sold to Charter.³⁴⁷ In addition to his work for distributors, Mr. Egan has worked for programmers, including independent networks, in his current position as an industry consultant. Mr. Egan has worked with Celtic Vision in connection with its national launch, GoodlifeTV, and Rainbow Programming, which owns American Movie Classics, IFC, and Sundance.³⁴⁸

³⁴² Tennis Channel Exh. 138 (Orszag Dep.) 24:7-25:5.

³⁴³ Egan Direct, Apr. 28, 2011 Tr. 1489:1-10.

³⁴⁴ See, e.g., *WealthTV*, 24 FCC Rcd at 12970 ¶ 5 n.19; Egan Direct, Apr. 28, 2011 Tr. 1488:1-14.

³⁴⁵ See, e.g., *WealthTV*, 24 FCC Rcd at 12979 ¶ 25 & n.91.

³⁴⁶ Comcast Exh. 77 (Egan Written Direct) ¶ 4; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1485:15-1486:16.

³⁴⁷ Comcast Exh. 77 (Egan Written Direct) ¶ 5; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1486:15-1487:3.

³⁴⁸ Comcast Exh. 77 (Egan Written Direct) ¶ 6; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1487:4-13.

128. To reach his conclusions that Tennis Channel is fundamentally dissimilar to Golf Channel and Versus in terms of programming, Mr. Egan conducted a comprehensive and systematic analysis of the networks' programming, including watching 35 hours of programming and reviewing and analyzing each network's programming schedules.³⁴⁹ Mr. Egan selected the programming to analyze, created the categories he used to analyze that programming, conducted the programming analysis, and tabulated the results of his analysis.³⁵⁰

129. Mr. Egan's familiarity with the programming on Golf Channel, Versus, and Tennis Channel was evident from his detailed testimony. Mr. Egan testified in great detail concerning the programming on each network, describing not only particular programs, but particular episodes of those programs, and discussing specific on-air hosts and personalities on all three networks.³⁵¹ Mr. Egan's testimony concerning the programming dissimilarities between Tennis Channel and Golf Channel and Versus is uncontroverted.

G. The Evidence Shows That Mr. Marc Goldstein's Opinions and Analyses Are Impartial and Reliable

130. Mr. Marc Goldstein testified on behalf of Comcast as an expert in sports advertising.³⁵² Mr. Goldstein had never previously served as an expert witness, and his testimony was independent and impartial.³⁵³

³⁴⁹ Comcast Exh. 77 (Egan Written Direct) ¶¶ 16, 28, 51; Egan Direct, Apr. 28, 2011 Tr. 1497:20-1499:11.

³⁵⁰ Egan Direct, Apr. 28, 2011 Tr. 1504:5-19.

³⁵¹ *See, e.g.*, Egan Direct, Apr. 28, 2011 Tr. 1510:5-1523:4, 1534:17-1548:14.

³⁵² Comcast Exh. 79 (Goldstein Written Direct) ¶ 1; Goldstein Direct, May 2, 2011 Tr. 2670:9-16.

³⁵³ Tennis Channel Exh. 136 (Goldstein Dep.) 6:20-22.

131. Mr. Goldstein's opinions and analyses were grounded in his more than forty years of experience in television advertising (including 36 years of experience purchasing advertising on television).³⁵⁴ Until 2010, Mr. Goldstein served as president and chief executive officer of Groupm, an umbrella company for Mindshare, Mediaedge, Mediacom and Maxus, the four independent media companies of the WPP Group, the world's largest advertising, media and research company.³⁵⁵ For seven years, as founder of General Motors Media Works, Mr. Goldstein was responsible for all of General Motors's national television advertising, including its sports advertising and sponsorship purchases.³⁵⁶ In addition, Mr. Goldstein served as chairman of the Media Policy Committee of the American Association of Advertising Agencies, the most senior media committee in the organization, and as a member of the board of directors of the Ad Council and the Partnership for a Drug Free America.³⁵⁷ Mr. Goldstein's testimony is uncontroverted.

XI. Comcast Has Not Unreasonably Restrained Tennis Channel's Ability to Compete Fairly

132. Comcast's decision not to accept Tennis Channel's 2009 proposal has not unreasonably restrained Tennis Channel's ability to compete fairly.³⁵⁸

³⁵⁴ Comcast Exh. 79 (Goldstein Written Direct) ¶¶ 2; Goldstein Direct, May 2, 2011 Tr. 2672:11-13.

³⁵⁵ Comcast Exh. 79 (Goldstein Written Direct) ¶¶ 7-10; Goldstein Direct, May 2, 2011 Tr. 2672:17-2673:9.

³⁵⁶ Comcast Exh. 79 (Goldstein Written Direct) ¶¶ 6-7; Goldstein Direct, May 2, 2011 Tr. 2674:17-2675:10.

³⁵⁷ Comcast Exh. 79 (Goldstein Written Direct) ¶¶ 8-9.

³⁵⁸ *See infra* ¶¶ 133-144.

A. Tennis Channel Is a Successful Network, and Comcast Has Contributed Significantly to Tennis Channel’s Success

133. With 26 million subscribers nationwide through 130 distributors,³⁵⁹

Tennis Channel has grown well beyond the 19 million subscribers deemed by the Commission to be the “minimum viable scale” for a start-up network.³⁶⁰ In 2005, Mr. Solomon publicly acknowledged that Tennis Channel could succeed with 25 million subscribers,³⁶¹ and Tennis Channel’s subscriber growth is consistent with its past projections.³⁶²

134. Tennis Channel has benefited from carriage on Comcast. Comcast was one of the first major distributors to launch Tennis Channel, and it did so without an equity-for-carriage deal and at a time when none of its principal competitors carried Tennis Channel.³⁶³ Tennis Channel has benefited from the “excellent growth” of Comcast’s sports tier, from fewer than {REDACTED} subscribers in December 2005 to approximately {REDACTED} subscribers in December 2010.³⁶⁴ In addition, Comcast has launched Tennis Channel on tiers more broadly distributed than its sports tier in approximately {REDACTED} Comcast systems, including top tennis markets such as

³⁵⁹ Solomon Direct, Apr. 25, 2011 Tr. 247:13-19; Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8.

³⁶⁰ *See In the Matter of the Commission’s Cable Horizontal and Vertical Ownership Limits, Implementation of Section 11 of The Cable Television Consumer Protection and Competition Act of 1997, Fourth Report & Order*, MM Docket No. 92-264, 23 FCC Rcd 2134, 2162 ¶ 57 (2008) (hereinafter “*Fourth Report & Order*”).

³⁶¹ Comcast Exh. 342.

³⁶² Comcast Exhs. 60, 66.

³⁶³ Comcast Exh. 75 (Bond Written Direct) ¶¶ 4-5; Comcast Exhs. 84, 85, 659.

³⁶⁴ Comcast Exhs. 156, 578; Comcast Exh. 77 (Egan Written Direct) ¶ 103.

Jacksonville, Florida.³⁶⁵ As a result, at the end of 2010, Comcast distributed Tennis Channel to approximately [REDACTED] subscribers, [REDACTED]

B. Tennis Channel's Current Distribution Allows It to Compete for Subscribers Across the United States

135. As Tennis Channel [REDACTED] the network's distribution by DIRECTV and Dish Network, which have nationwide reach, makes it "Available to Every US Home."³⁶⁷

136. A Comcast subscriber who wants to receive Tennis Channel could subscribe to Comcast's sports tier for about \$5-8 per month, or could switch to DIRECTV or Dish Network – or, in many markets, to Verizon FiOS, AT&T U-Verse or a cable over-builder.³⁶⁸

137. Under these circumstances, Tennis Channel's current distribution allows it to compete for potential subscribers across the entire United States.

³⁶⁵ Bond Direct, Apr. 29, 2011 Tr. 1989:15-1990:5; Comcast Exh. 75 (Bond Written Direct) ¶ 7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 21; Comcast Exh. 80 (Orszag Written Direct) ¶ 28; Comcast Exhs. 205, 206.

³⁶⁶ Comcast Exhs. 201, 206. The number of Tennis Channel subscribers increased from fewer than [REDACTED] } in December 2005 to more than [REDACTED] at the end of 2010. (Comcast Exh. 206).

³⁶⁷ Comcast Exh. 435 at TTCCOM_00019691; Solomon Direct Apr. 25, 2011 Tr. 247:13-248:9.

³⁶⁸ Comcast Exh. 78 (Gaiski Written Direct) at ¶ 4; Orszag Cross, Apr. 27, 2011 Tr. 1370:16-1371:16, 1459:13-1460:1.

C. Tennis Channel's Current Subscriber Count Results from Its Own Deliberate Decisions

138. The evidence shows that it was Tennis Channel, not Comcast, that broke off negotiations over broader carriage.³⁶⁹ Even after Mr. Solomon learned that other non-affiliated sports tier networks (Sportsman Channel and Outdoor Channel) had exchanged value to incentivize Comcast to give them more distribution, he failed to follow up with Mr. Bond to see whether Tennis Channel might be able to strike a similar deal under which it offered some additional value in exchange for the additional distribution it was seeking.³⁷⁰

139. [REDACTED]

[REDACTED]³⁷¹

140. Tennis Channel's internal documents show, and one of its experts acknowledged, that investment in compelling programming is another way to obtain increased distribution,³⁷² yet Tennis Channel spends less on its programming than almost any other national sports network.³⁷³ Tennis Channel has the ability to raise additional funds in the capital markets to purchase more valuable programming that might command more interest and demand in the marketplace.³⁷⁴

³⁶⁹ See *supra* ¶ 32.

³⁷⁰ See *supra* ¶ 42.

³⁷¹ Comcast Exh. 707 at TTCCOM_00018552; Comcast Exh. 709.

³⁷² Comcast Exh. 349 (Brooks Dep.) 380:23-381:18; Comcast Exh. 89.

³⁷³ See *supra* ¶ 93.

³⁷⁴ Comcast Exhs. 89, 266; Comcast Exh. 517 (Solomon Dep.) 68:7-70:6.

D. Tennis Channel’s Failure to Reach {REDACTED} Million Subscribers Did Not Result from Comcast’s Decision Not to Accept Tennis Channel’s 2009 Proposal

141. Tennis Channel has argued in this litigation that it needs distribution to {REDACTED} to {REDACTED} million subscribers to improve its success with rightsholders and advertisers.³⁷⁵ If Comcast had accepted the D1 option in Tennis Channel’s 2009 proposal, then Tennis Channel still would have fewer than {REDACTED} million subscribers.³⁷⁶

142. Tennis Channel asserts that being distributed to fewer than {REDACTED} subscribers affected its acquisition of French Open rights.³⁷⁷ But if Comcast had accepted the D0 option in Tennis Channel’s 2009 proposal, then Tennis Channel would still not reach {REDACTED} million subscribers.³⁷⁸ Tennis Channel also argues that it loses programming rights to ESPN2 because ESPN2 has greater distribution.³⁷⁹ However, if Tennis Channel were distributed to every Comcast subscriber, it would still have half as many as ESPN2’s approximately 99 million subscribers.³⁸⁰

143. Networks have multiple avenues – including cable companies, satellite operators (e.g., DIRECTV and Dish Network), telcos (e.g., Verizon FiOS and AT&T U-Verse) and Internet streaming – for reaching paying subscribers.³⁸¹

³⁷⁵ Tennis Channel Trial Brief at 15-16; Tennis Channel Exh. 15 (Solomon Written Direct) ¶¶ 40-41.

³⁷⁶ Comcast Exhs. 201, 588, 638.

³⁷⁷ Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 41.

³⁷⁸ Comcast Exh. 201.

³⁷⁹ Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 41.

³⁸⁰ Comcast Exh. 201; Comcast Exh. 203 at 258.

³⁸¹ See, e.g., HRTV web site, www.hrtvlive.com/hrtv (last visited June 6, 2011) (HRTV, formerly HorseRacing TV, is available on a subscription basis over the Internet in addition to being available on Comcast’s sports tier).

144. Tennis Channel could reach { [REDACTED] } to { [REDACTED] } million subscribers without any additional Comcast subscribers.³⁸² Tennis Channel could obtain { [REDACTED] } million additional subscribers solely from its parent companies, DIRECTV and Dish Network, for a total of { [REDACTED] } million subscribers.³⁸³

XII. Tennis Channel's Requested Relief Is Unwarranted

145. The following findings of facts relate to the relief that Tennis Channel seeks in this litigation, as discussed further in the conclusions of law below.

A. The Broad Distribution Requested by Tennis Channel Is Unwarranted

146. Through this litigation, Tennis Channel requests distribution significantly broader than the increased distribution that Tennis Channel proposed to Comcast in 2009.³⁸⁴ Such broad distribution would increase Comcast's total license payments to Tennis Channel by more than \$ { [REDACTED] } million.³⁸⁵

147. Tennis Channel requests greater penetration on Comcast than { [REDACTED] }

[REDACTED]

³⁸² See Comcast Exh. 201; Comcast Exh. 368 (Herman Dep.) 367:9-13; Comcast Exh. 363 (Singer Dep.) 336:20-338:2; Comcast Exh. 646 (Simon Dep.) 71:19-24.

³⁸³ Comcast Exh. 201; *see also* Comcast Exhs. 100, 715; Solomon Redirect, Apr. 25, 2011 Tr. 511:3-512:4; Tennis Channel Exh. 15 (Solomon Written Direct) ¶ 8.

³⁸⁴ Tennis Channel Exh. 18 (Complaint) ¶¶ 101-102; Solomon Cross, Apr. 25, 201 Tr. 322:15-324:21 (“Q: You are suing here for greater distribution than the D1 distribution you proposed in May of 2009, correct? A: As it stands today, yes.”).

³⁸⁵ Comcast Exh. 80 (Orszag Written Direct) ¶ 26.

148. Tennis Channel requests that Comcast be ordered to provide Tennis Channel with more subscribers than [REDACTED]

[REDACTED]³⁸⁶

B. Regardless, the Cost Increase Demanded by Tennis Channel Is Unwarranted

149. Tennis Channel seeks broader distribution at the per-subscriber license fees set forth in the Affiliation Agreement.³⁸⁷ Comcast agreed to Tennis Channel's fees as part of an integrated agreement that granted Comcast the right to carry Tennis Channel on a sports tier.³⁸⁸ In negotiating the Affiliation Agreement, Tennis Channel had justified its fees by emphasizing the economics of sports tier carriage, and Comcast agreed because it intended to carry Tennis Channel on a sports tier.³⁸⁹ Comcast informed Tennis Channel as early as 2005 that the high cost of its license fees, in light of the nature of the network's niche programming, was an impediment to achieving broader distribution.³⁹⁰

150. Independent networks such as Sportsman Channel and Outdoor Channel have been able to obtain broader distribution from Comcast by [REDACTED]

[REDACTED]³⁹¹

³⁸⁶ Comcast Exh. 201; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23. DIRECTV carries Tennis Channel [REDACTED] subscribers while Dish Network distributes the network to [REDACTED] subscribers. (Comcast Exh. 201).

³⁸⁷ Tennis Channel Exh. 18 (Complaint) ¶¶ 101-102.

³⁸⁸ See *supra* ¶¶ 16-18.

³⁸⁹ See *supra* ¶¶ 16 n.31, 18.

³⁹⁰ Comcast Exh. 78 (Gaiski Written Direct) ¶ 10; Comcast Exh. 629.

³⁹¹ Comcast Exh. 78 (Gaiski Written Direct) ¶ 23.

151. Similarly, Comcast melted the NHL Network from the sports tier to D1 after that network reduced its rate so that the total cost to Comcast for carrying it on D1 was effectively the same as the cost for distributing it on the sports tier.³⁹²

³⁹² Comcast Exh. 75 (Bond Written Direct) ¶ 24; Gaiski Cross, May 2, 2011 Tr. 2455:5-21.

PROPOSED CONCLUSIONS OF LAW

Legal Standards

I. Burden of Proof

152. In this *de novo* proceeding,³⁹³ Tennis Channel bears the burden of proceeding with the introduction of evidence and the burden of proving its claim by a preponderance of the evidence.³⁹⁴

II. Governing Statutory and Regulatory Provisions

153. Section 616 of the 1992 Cable Act directs the Commission to promulgate regulations that “prevent an [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”³⁹⁵

154. The Commission’s implementing regulations provide that “[n]o [MVPD] shall engage in conduct the effect of which is to unreasonably restrain the ability of an

³⁹³ *The Tennis Channel, Inc., v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, 25 FCC Rcd 14149, 14150 ¶ 2 (MB 2010) (hereinafter “*HDO*”).

³⁹⁴ *MASN*, 25 FCC Rcd at 18106 ¶ 12 n.58 (“[E]ven if there were an evidentiary equipoise in this case, [the MVPD] still would prevail absent a preponderance of evidence favoring [the complainant].”); *id.* at 18104 ¶ 10 (finding for the defendant because the complainant “failed to demonstrate” that the defendant engaged in affiliation-based discrimination); *WealthTV*, 24 FCC Rcd at 12995 ¶ 58 (complainant bears “both the burden of proceeding with the introduction of evidence and the burden of proof” (internal quotation marks omitted)). This burden allocation reflects “the usual practice of requiring that the party seeking relief by Commission order . . . bear the burden of proving that the violations occurred.” *Id.* (citing, *inter alia*, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) and 5 U.S.C. § 556(d)).

³⁹⁵ 47 U.S.C. § 536(a)(3).

unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors.”³⁹⁶

155. To establish a violation by Comcast of Section 616 and Section 76.1301(c), Tennis Channel must prove each of two elements. First, Tennis Channel must prove that Comcast discriminated against it in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation.³⁹⁷ Second, it must prove that the effect of the alleged affiliation-based discrimination was to unreasonably restrain Tennis Channel’s ability to compete fairly.³⁹⁸

III. The Governing Provisions Must Be Construed and Applied Narrowly

A. The Presiding Judge Must “Rely on the Marketplace to the Maximum Extent Feasible”

156. In passing the 1992 Cable Act, Congress recognized that business relationships between networks and distributors are matters of private commercial negotiation, and instructed the Commission to “rely on the marketplace to the maximum extent feasible.”³⁹⁹ In promulgating its program carriage rules, the Commission did not intend to “preclud[e] legitimate business practices common to a competitive marketplace.”⁴⁰⁰

³⁹⁶ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

³⁹⁷ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56.

³⁹⁸ 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56.

³⁹⁹ 1992 Cable Act § 2(b)(2); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁴⁰⁰ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and*

157. Today, the competitive environment is different than it was nearly twenty years ago when the Cable Act was passed because “[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.”⁴⁰¹ “Perhaps the most important difference between the industry in 1992 and today [2001] is that in 1992 there was no clear nationwide substitute for cable.”⁴⁰² The competitive landscape is even more crowded today.⁴⁰³ Unlike in 1992, cable companies now face fierce competition from at least two and in some cases three other MVPDs – two satellite providers plus perhaps a telco or cable overbuilder – in every geographic market.⁴⁰⁴

Diversity in Video Programming Distribution and Carriage, Second Report & Order, MM Docket No. 92-265, 9 FCC Rcd 2642, 2642 ¶ 1 (1992) (hereinafter “*Second Report & Order*”); see also *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁴⁰¹ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

⁴⁰² *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking*, MM Docket No. 98-92, 16 FCC Rcd 17312, 17326-27 ¶ 22 (2001) (hereinafter “*Section 11 FNPRM*”).

⁴⁰³ *Comcast Corp.*, 579 F.3d at 6 (“Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years.”).

⁴⁰⁴ See *Comcast Corp.*, 579 F.3d at 8 (“A cable operator faces competition primarily from non-cable companies, such as those providing [satellite] service and, increasingly, telephone companies providing fiber optic service.”); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, 24 FCC Rcd 4401, 4403 ¶ 4 (2009) (hereinafter “*Status of Competition*”) (“Since 2007, there have been a number of changes in the market for the delivery of video programming to consumers, including the expansion of the areas where Verizon and AT&T compete with incumbent cable operators and an increase in the amount of video programming distributed over the Internet.”); see also *Comments of NCTA, In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 8, March 28, 2008 (“Since 1992, the development of Direct Broadcast Satellite (DBS) service – which was only just beginning when the ownership provisions were enacted – has fundamentally transformed the distribution marketplace. Today, consumers across the nation have at least three competitive sources of subscription multichannel television services: at least one cable operator, and two established DBS providers.”).

158. This fierce competition with other MVPDs “reduces cable operators’ incentive to choose programming for reasons other than quality because a cable operator that selects programming on some other basis risks loss of subscribers if high quality programming is available via [satellite].”⁴⁰⁵ Competition with other MVPDs also makes it imperative that cable companies control programming expenses.⁴⁰⁶

B. The Commission’s Program Carriage Rules Should Not Be Construed to Negate the Legitimate Benefits of Vertical Integration

159. The Commission’s program carriage rules should not be interpreted in any manner that would negate the many legitimate benefits of vertical integration, which have been acknowledged by Congress and the Commission. As the legislative history of the Cable Act of 1992 reflects, Congress rejected recommendations to prohibit vertical integration altogether.⁴⁰⁷ Instead, Congress recognized “that vertical integration in the cable industry has contributed to enhancing development of innovative programming ventures through efficiencies in financing and by compensating cable systems for assuming the risk associated with launching new programming services.”⁴⁰⁸ Similarly,

⁴⁰⁵ *Section 11 FNPRM*, 16 FCC Rcd at 17326-27 ¶ 22; *see also MASN*, 25 FCC Rcd at 18113 ¶ 20 (noting that “TWC, under pressure from [satellite] competition, is seeking to free up as much spectrum as possible to add new HD services”).

⁴⁰⁶ *See Comcast Corp.*, 579 F.3d at 7; *Section 11 FNPRM*, 16 FCC Rcd at 17326-27 ¶ 22 & n.65.

⁴⁰⁷ *See* S. Rep. No. 102-92, at 27 (1991) (rejecting a proposal to ban vertical integration because “it would result in a fundamental restructuring of the cable industry and the way it does business”).

⁴⁰⁸ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rulemaking*, 8 FCC Rcd 194, 195 ¶ 5 (1993) (citing H.R. Rep. No. 102-628, at 41 (1992)) (hereinafter “*Sections 12 and 19 NPRM*”); S. Rep. 102-92, at 26-27 (citing benefits of vertical integration, including the way in which vertical integration has “stimulated the development of

the Commission repeatedly has recognized the many benefits of vertical integration, including the potential to “generate significant efficiencies.”⁴⁰⁹

C. The First Amendment Requires Narrow Interpretation of the Commission’s Program Carriage Rules

160. The First Amendment grants an MVPD “editorial discretion over which [networks] to include in its repertoire,”⁴¹⁰ and requires considerable deference to an MVPD’s editorial decisions.⁴¹¹ The First Amendment’s protection applies with equal force to vertically integrated MVPDs.⁴¹² Because the program carriage rules implicate an MVPD’s editorial decisions regarding how to distribute content to its subscribers – and

programming that was necessary to flesh out the promise of cable”); 138 Cong. Rec. S654, S660 (daily ed. Jan. 30, 1992) (statement of Sen. Timothy Wirth) (noting that both the Department of Justice and the Commission agreed that “the many benefits of vertical integration outweigh the costs”); *see also* 47 U.S.C. § 533(f)(2)(D).

⁴⁰⁹ *In the Matter of General Motors Corp. and Hughes Electronics Corp., Transferors and the News Corporation Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, at 507-08 (2004); *Fourth Report & Order*, 23 FCC Rcd at 2194 ¶ 142 (“Both Congress and the Commission have recognized that vertical integration can produce efficiencies in the production, distribution, and marketing of video programming, enabling cable operators to make additional investments in distribution plant and programming.”).

⁴¹⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also City of Los Angeles v. Preferred Commc’ns Inc.*, 476 U.S. 488, 494 (1986).

⁴¹¹ *See MASN*, 25 FCC Rcd at 18106 ¶ 12 (“TWC contends, among other things, that the Bureau erred in failing to accord sufficient deference to TWC’s editorial judgment. We agree.”) (citations omitted); *Kucinich v. Cable News Network*, 23 FCC Rcd 482, 482-83 ¶ 2 (MB 2008); *cf. CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (“The Commission has stated that, in enforcing [Section 312(a)(7) of the Communications Act of 1934], it will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.” (internal quotation marks omitted)).

⁴¹² *See, e.g., MASN*, 25 FCC Rcd at 18106 ¶ 12; H.R. Rep. 102-628, at 173 (“We note as well that cable operators are vested with certain First Amendment rights with which the Congress should not tamper.”).

thus are content-based – they must be narrowly construed.⁴¹³ In addition, the Commission has recognized that “any attempt to distinguish between different types” of networks “is likely to raise Constitutional concerns.”⁴¹⁴

161. Congress did not intend to permit the Commission to substitute its own judgments for a cable operator’s editorial discretion and overturn a cable operator’s good faith business judgments regarding the appropriate distribution of content.⁴¹⁵ The First Amendment protects a cable operator from being compelled to carry a program or network that “reason tells them” should not be carried.⁴¹⁶

162. In *MASN*, the Commission credited Time Warner Cable’s claim that its carriage decision, which was based on a “cost-benefit analysis,” was a “reasonable exercise of editorial discretion.”⁴¹⁷

⁴¹³ See *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) (“Laws that regulate speech based on its content or that compel speakers to . . . distribute speech bearing a particular message are subject to strict scrutiny.” (internal quotations and citations omitted)).

⁴¹⁴ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29, 22 FCC Rcd 17791, 17840 ¶ 69 (MB 2007).

⁴¹⁵ See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (Where “an administrative interpretation of a statute invokes the outer limit of Congress’ power,” courts “expect a clear indication that Congress intended that result.”).

⁴¹⁶ See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (internal quotation marks omitted).

⁴¹⁷ *MASN*, 25 FCC Rcd at 18106 ¶ 12.

IV. Discrimination Standard

163. The “relevant inquiry” in a program carriage case is whether an MVPD “acted upon” a motive to discriminate on the basis of affiliation or non-affiliation.⁴¹⁸ “The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out ‘on the basis of an unaffiliated programming vendor’s affiliation or nonaffiliation.’”⁴¹⁹ “[U]nder this standard, a vertically integrated MVPD may treat unaffiliated programmers differently from affiliates, so long as . . . such treatment did not result from the programmer’s status as an unaffiliated entity.”⁴²⁰ In order to prove affiliation-based discrimination, an unaffiliated network must prove that its status as an unaffiliated entity “actually played a role” in the challenged carriage decision and “had a determinative influence on the outcome.”⁴²¹

164. There is no affiliation-based discrimination where the challenged carriage decision was based on legitimate business reasons.⁴²² Where – as here – the legitimate business reasons for a negative carriage decision are memorialized in contemporaneous

⁴¹⁸ *Id.* at 18115 ¶ 22; *see also WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63.

⁴¹⁹ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (quoting 47 U.S.C. § 536 (a)(3) (brackets omitted)).

⁴²⁰ *Id.* ((brackets and internal quotation marks omitted); *see id.* at 18108 ¶ 13 n.68 (“We find no basis in the record to conclude that TWC’s carriage of its affiliated RSNs on basic or expanded basic tiers while refusing such carriage to MASN was motivated by considerations of affiliation rather than by the demand, cost, and bandwidth considerations presented by each network.”). In *MASN*, the Commission ruled that the complainant bears the burden of proving its claim by a preponderance of the evidence. *See supra* ¶ 152 & n.394.

⁴²¹ *See WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (quotation marks and citation omitted).

⁴²² *MASN*, 25 FCC Rcd at 18099, 18104-06 ¶¶ 1, 10-12; *WealthTV*, 24 FCC Rcd at 12988, 12999 ¶¶ 65, 67.

documentation, that documentation is, according to the Commission, a basis to “truncat[e]” program carriage litigation.⁴²³

165. Conducting “a cost/benefit analysis and determin[ing] that the benefits of [broader carriage] would not outweigh the substantial costs” is, as a matter of law, a “legitimate and non-discriminatory” basis for deciding against broader carriage.⁴²⁴

Accordingly, the “high cost of carriage” is a legitimate basis for rejecting a programmer’s demand.⁴²⁵ In assessing whether the potential benefits of broader carriage of an unaffiliated network outweigh the costs, evidence of limited demand for the network is a legitimate and non-discriminatory reason counseling against broader carriage.⁴²⁶

Evidence of limited demand includes evidence that an MVPD “received no appreciable subscriber complaints” regarding the lack of broader carriage of the unaffiliated network.⁴²⁷ Other evidence of limited demand includes the absence of customer defection to competitor MVPDs that do carry the programming more broadly, and the lack of advertising by competing MVPDs of the programming discrepancy.⁴²⁸

166. The fact that non-vertically integrated cable operators make similar carriage decisions as the vertically integrated MVPD provides “independent evidence” that the vertically integrated MVPD has not engaged in affiliation-based discrimination

⁴²³ *MASN*, 25 FCC Rcd at 18114 ¶ 21.

⁴²⁴ *Id.* at 18106, 18112 ¶¶ 12, 19.

⁴²⁵ *Id.* at 18112 ¶ 19.

⁴²⁶ *Id.* at 18106-07 ¶ 13.

⁴²⁷ *Id.* at 18109-10 ¶ 15.

⁴²⁸ *Id.*

because the non-vertically integrated MVPDs’ carriage decisions cannot possibly be based on affiliation.⁴²⁹

V. Unreasonable Restraint of the Ability to Compete Fairly

167. A network alleging that its ability to compete fairly is “unreasonably restrain[ed]” must do more than simply show that the challenged carriage decision “adversely affected its competitive position in the marketplace.”⁴³⁰ At a minimum, the network must show that any adverse effect was caused by something other than “a decision . . . on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition.”⁴³¹

168. Unlike in 1992, networks now have multiple avenues – including cable companies, satellite operators (e.g., DIRECTV and Dish Network), telcos (e.g., Verizon FiOS and AT&T U-Verse) and Internet streaming – for reaching paying subscribers.⁴³² Thus, if a network invests in sufficiently compelling content, it need not rely on a single MVPD to meet its distribution goals. Accordingly, the program carriage rules should not be a lever for a network to force a distributor to, in effect, function as an investor or banker by providing the funds that the network needs to buy more valuable programming, which, in turn, may lead to increased distribution.⁴³³

⁴²⁹ *See id.* at 18111-12 ¶ 18.

⁴³⁰ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (alteration in original).

⁴³¹ *Id.* at 13003 ¶ 73.

⁴³² *See supra* ¶ 143.

⁴³³ *Cf.* 1992 Cable Act § 2(b)(2) (Congress instructed the Commission to “rely on the marketplace to the maximum extent feasible.”); *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

Legal Analysis

I. Tennis Channel Has Not Carried Its Burden of Proving That Comcast’s Decision Not to Accept Its 2009 Proposal Constituted Affiliation-Based Discrimination

169. The carriage decision that Tennis Channel challenges in this case is Comcast’s decision not to accept Tennis Channel’s 2009 proposal for broader carriage.⁴³⁴ The uncontroverted evidence establishes that Tennis Channel’s status as an unaffiliated network played no role – much less the required determinative role⁴³⁵ – in Comcast’s decision not to accept Tennis Channel’s 2009 proposal for broader carriage.⁴³⁶ Indeed, it was Mr. Solomon, not Mr. Bond, who cut off negotiations rather than work toward a compromise where the costs and benefits to Comcast were more balanced.⁴³⁷

A. Comcast’s Decision Not to Accept Tennis Channel’s 2009 Proposal Was Based on Legitimate Business Reasons and Not on Affiliation

170. The evidence shows that Comcast’s carriage decision in 2009 was based not on discrimination, but on a cost-benefit analysis, the same type of analysis that the Commission ruled in *MASN* is a legitimate and non-discriminatory business rationale.⁴³⁸ The evidence included credible, uncontroverted testimony from two Comcast executives,

⁴³⁴ See, e.g., Tennis Channel Exh. 18 (Complaint) ¶ 52; Tennis Channel Opening, Apr. 25, 2011 Tr. 116:5-12. The foregoing determination is not inconsistent with, and in no way prejudices, Comcast’s statute of limitations defense, which is not a matter designated for the Chief Administrative Law Judge to resolve in this proceeding. *HDO*, 25 FCC Rcd at 14149-50 ¶ 2 n.4.

⁴³⁵ *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63.

⁴³⁶ See *supra* ¶¶ 38, 43-46; cf. *WealthTV*, 24 FCC Rcd at 12989-90 ¶ 45 (network’s peremptory termination of negotiations was not evidence that Comcast failed to negotiate in good faith).

⁴³⁷ See *supra* ¶ 32.

⁴³⁸ *MASN*, 25 FCC Rcd at 18104-06, 18112 ¶¶ 10-12, 19; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67.

corroborated by contemporaneous documentation, that Comcast conducted a cost-benefit analysis and determined that the [REDACTED] million of additional costs greatly outweighed any anticipated benefits.⁴³⁹ Tennis Channel's own contemporaneous analysis also showed that accepting the 2009 proposal would have increased Comcast's costs considerably.⁴⁴⁰

171. Tennis Channel offered no analysis of its own as to benefits that would offset these increased costs in order to refute or discredit Comcast's analysis. It is not discrimination for corporations, such as Comcast, in the business of earning profits for shareholders, to decline proposals that appear likely to produce losses.⁴⁴¹ There is no legal requirement under Section 616 that corporations in the business of distributing video programming either incur losses or increase subscriber fees merely to increase distribution of programming to consumers who can already purchase that programming.⁴⁴²

B. Comcast's Prior Carriage Decisions Are Evidence That It Has Not Discriminated Against Tennis Channel

172. The evidence shows that Comcast was among the first large MVPDs to carry Tennis Channel, and that Tennis Channel's distribution on Comcast has grown significantly.⁴⁴³ These facts are not consistent with Tennis Channel's discrimination claim.

⁴³⁹ See *supra* ¶¶ 28, 37-38, 40.

⁴⁴⁰ See *supra* ¶ 28 n.63.

⁴⁴¹ See *MASN*, 25 FCC Rcd at 18106 ¶ 12; see also *Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

⁴⁴² See *MASN*, 25 FCC Rcd at 18106 ¶ 12; see also *Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

⁴⁴³ See *supra* ¶ 134.

173. The evidence relating to Comcast’s consideration of Tennis Channel’s MFN offers in 2006 and 2007 also shows that Comcast did not act based on any motive to discriminate against Tennis Channel because of its non-affiliation.⁴⁴⁴ Comcast performed a cost-benefit analysis of each offer, documented its analysis and explained its analysis to Tennis Channel.⁴⁴⁵ There is no evidence that Tennis Channel ever disagreed with or disputed those cost-benefit analyses, which evaluated Tennis Channel as if it were an affiliate, partially owned by Comcast, and Mr. Solomon testified that Comcast’s decisions to reject these offers were not discriminatory.⁴⁴⁶

174. The evidence establishes that it was Tennis Channel, not Comcast, that ended negotiations in June 2009, when Tennis Channel’s CEO declared that he was not interested in “half measures,” and that further negotiations would be a “waste of time.”⁴⁴⁷ As in *WealthTV*, Comcast’s willingness to continue negotiations demonstrates that it did not act on any discriminatory motive.⁴⁴⁸ The fact that shortly after Tennis Channel ended negotiations, Comcast successfully negotiated broader carriage deals with two other unaffiliated networks is further evidence of non-discrimination.⁴⁴⁹

⁴⁴⁴ See *supra* ¶¶ 24-26.

See *supra* ¶ 26 n.58.

⁴⁴⁵ See *supra* ¶¶ 24-26.

⁴⁴⁶ See *supra* ¶ 26.

⁴⁴⁷ See *supra* ¶ 32.

⁴⁴⁸ *WealthTV*, 24 FCC Rcd at 12990 ¶ 45 (“Even though carriage of *WealthTV* was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith.”).

⁴⁴⁹ See *supra* ¶ 42.

C. Tennis Channel’s Carriage by Other Distributors Provides Independent Evidence That Comcast Has Not Discriminated Against Tennis Channel

175. Comcast’s carriage of Tennis Channel is consistent with the carriage of Tennis Channel by other MVPDs, including other cable operators unaffiliated with Golf Channel and Versus, whose carriage decisions provide “independent evidence” that a cable company has not engaged in discrimination on the basis of affiliation.⁴⁵⁰ As of May 2009 and continuing through today, all other major cable operators have carried Tennis Channel on a sports tier, and Comcast distributes Tennis Channel to a higher percentage of its subscribers than [REDACTED] one of which (Cablevision) did not carry Tennis Channel at all until late 2009.⁴⁵¹ Comcast carries Tennis Channel to a higher percentage of its subscribers than [REDACTED] [REDACTED] [REDACTED] }⁴⁵² Those cable companies provide important context for Comcast’s carriage decisions because they face the same competitive pressures (from satellite, telco distributors, and overbuilders), use similar technologies, and face similar bandwidth constraints.⁴⁵³ No cable company owns equity in Tennis Channel.⁴⁵⁴

176. Tennis Channel was carried on only one of the two major telco providers as of May 2009 – AT&T did not carry Tennis Channel at all until 2010, when it agreed to a { [REDACTED] } distribution level.⁴⁵⁵ In January 2010, Tennis Channel was negatively repositioned by Verizon to a lower distribution level [REDACTED]

⁴⁵⁰ See *supra* ¶¶ 67-72; *MASN*, 25 FCC Rcd at 18111 ¶ 18.

⁴⁵¹ See *supra* ¶¶ 67-71.

⁴⁵² See *supra* ¶ 69 n.168.

⁴⁵³ See *supra* ¶ 68.

⁴⁵⁴ See *supra* ¶ 68.

⁴⁵⁵ See *supra* ¶¶ 33 n.75, 71.

178. Tennis Channel’s own documents also show that – like Comcast – Time Warner Cable, Charter, Cablevision, Dish Network, and Verizon all refused to grant Tennis Channel broad carriage between 2009 and 2010, citing Tennis Channel’s high cost and lack of consumer demand.⁴⁶² These distributors’ decisions confirm the testimony that Tennis Channel’s programming is not sufficiently compelling to attract new subscribers, and provide independent evidence that Comcast declined Tennis Channel’s 2009 proposal for legitimate business reasons, not because of affiliation.⁴⁶³

II. Tennis Channel Has Failed to Establish That Comcast Has Unreasonably Restrained Its Ability to Compete Fairly

179. With 26 million subscribers, Tennis Channel is a successful network.⁴⁶⁴ And as one of the first large distributors to launch Tennis Channel, Comcast has contributed significantly to that success.⁴⁶⁵ Tennis Channel has benefited from a [REDACTED] } increase in Comcast subscribers since the end of 2005, including through broad distribution on approximately [REDACTED] } Comcast systems.⁴⁶⁶ As of the end of 2010, Comcast carried Tennis Channel to more subscribers than any distributor not affiliated with Tennis Channel.⁴⁶⁷

180. The evidence shows that Tennis Channel is able to compete fairly for subscribers, including substantially all Comcast subscribers, across the country. With

conceded that he proposed granting equity to Dish Network and DIRECTV, which were previously unwilling to carry the network at all, in exchange for greater distribution. *See supra* ¶ 22.

⁴⁶² *See supra* ¶¶ 48-51, 71.

⁴⁶³ *See supra* ¶¶ 53, 72.

⁴⁶⁴ *See supra* ¶ 133.

⁴⁶⁵ *See supra* ¶ 134.

⁴⁶⁶ *See supra* ¶ 134.

⁴⁶⁷ *See supra* ¶ 134.

130 distributors, including Comcast, Tennis Channel is well positioned to compete for additional subscribers.⁴⁶⁸ Its equity-for-carriage deals with DIRECTV and Dish Network give the network access to potential subscribers in every U.S. market.⁴⁶⁹ In every Comcast market, Comcast subscribers who do not wish to purchase Tennis Channel on the sports tier can switch to DIRECTV or Dish Network or, in some markets, to Verizon FiOS, AT&T U-Verse or a cable overbuilder.⁴⁷⁰

181. Tennis Channel argues that merely by declining to distribute the network to additional subscribers, Comcast has “supress[ed] Tennis Channel’s subscriber numbers,” thereby unreasonably restraining its ability to compete fairly.⁴⁷¹ As a matter of fact, however, Comcast cannot be accurately described as “suppressing” Tennis Channel’s distribution when Comcast distributes the network to more than {█} million subscribers and makes it available on a sports tier to substantially all of the rest of its subscribers.⁴⁷² As a matter of law, Section 616 is intended to enable non-affiliated programmers to compete fairly, not to insulate them from the need to compete at all for subscribers.⁴⁷³ The requirement of an unreasonable restraint on the ability to compete fairly would be meaningless if it could be satisfied by any decision not to distribute a

⁴⁶⁸ See *supra* ¶¶ 133, 135-37.

⁴⁶⁹ See *supra* ¶ 135.

⁴⁷⁰ See *supra* ¶ 136; *Comcast Corp.*, 579 F.3d at 8; *Status of Competition*, 24 FCC Rcd at 4403 ¶ 4.

⁴⁷¹ Tennis Channel Trial Brief at 16-17.

⁴⁷² See *supra* ¶¶ 134, 136.

⁴⁷³ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (“[T]he only restraints proscribed by sections 616 and 76.1301(c) are those that are ‘unreasonabl[e].’” (quoting 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c))).

network to additional subscribers – particularly where, as here, those subscribers already have access to the network on a sports tier, and on competing MVPDs.

182. Further, having enjoyed the benefits of carriage by Comcast for more than six years, it is unfair of Tennis Channel to seek to deprive Comcast of the sports tier right that gained Tennis Channel distribution in March 2005. To hold otherwise would be contrary to Congress’s mandate to “rely on the marketplace to the maximum extent feasible,”⁴⁷⁴ and to the Commission’s aim to serve that mandate without “precluding legitimate business practices common to a competitive marketplace.”⁴⁷⁵

183. The evidence shows that Tennis Channel’s current distribution level results from its own deliberate decisions, including decisions regarding pricing and investment in programming. Tennis Channel has, according to its internal documents, long resisted price reductions sufficient to broaden its carriage, and spends less on its programming than nearly every other national sports network.⁴⁷⁶ Further, Tennis Channel broke off negotiations between the parties after rejecting Comcast’s counteroffer.⁴⁷⁷ Thus, Tennis Channel has failed to satisfy its burden of proving that Comcast’s decision to decline the 2009 proposal is the proximate cause of any harm to Tennis Channel’s ability to compete fairly.

184. Regardless, the evidence shows that Tennis Channel has failed to meet its burden to prove that Comcast’s denial of Tennis Channel’s 2009 proposal was the proximate cause of the harm that Tennis Channel alleges. Tennis Channel’s theory of

⁴⁷⁴ 1992 Cable Act § 2(b)(2).

⁴⁷⁵ *Second Report & Order*, 9 FCC at 2642 ¶ 1; *see also MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁴⁷⁶ *See supra* ¶¶ 139-40.

⁴⁷⁷ *See supra* ¶ 32.

competitive harm is premised on not having at least {REDACTED} million subscribers.⁴⁷⁸

But the evidence shows that Tennis Channel would not reach at least {REDACTED} million subscribers, even if Comcast had accepted the 2009 proposal.⁴⁷⁹ According to Tennis

Channel, carriage on Comcast’s sports tier results in the network’s total distribution of

{REDACTED} But if Comcast had accepted

Tennis Channel’s proposal for D1 carriage in May 2009, then Tennis Channel would *still*

have fewer than {REDACTED} million total subscribers.⁴⁸¹ Similarly, if Comcast were to

distribute Tennis Channel to every Comcast subscriber, Tennis Channel would still have

insufficient distribution to meet the {REDACTED} million subscriber threshold purportedly

required by certain tennis rightsholders to broadcast their “most desirable matches.”⁴⁸²

Under these circumstances, Tennis Channel has not proved that Comcast’s decision to

decline the 2009 proposal was the proximate cause of the harm that Tennis Channel

alleges.⁴⁸³

⁴⁷⁸ See, e.g., Tennis Channel Trial Brief at 15-17; Tennis Channel Exh. 18 (Complaint) ¶¶ 88-89.

⁴⁷⁹ See *supra* ¶¶ 141-44.

⁴⁸⁰ Tennis Channel Trial Brief at 15.

⁴⁸¹ See *supra* ¶ 141. Tennis Channel could, however, reach {REDACTED} million subscribers through additional carriage on its parent companies – DIRECTV and Dish Network – alone. See *supra* ¶ 144.

⁴⁸² See *supra* ¶ 142.

⁴⁸³ See *supra* ¶¶ 141-44.

III. Section 616 Is Not Intended to Eliminate Carriage Differences Among Networks Resulting from Natural Competitive Forces

185. The evidence shows that Tennis Channel differs from Versus and Golf Channel in numerous significant respects that are reflected in how those networks are carried throughout the marketplace.⁴⁸⁴

186. Tennis Channel was launched in 2003, years after Versus and Golf Channel launched and obtained broad carriage. The evidence shows that, as a result, Tennis Channel launched into materially different market conditions.⁴⁸⁵ As set forth above, it was far easier for cable networks to gain broad distribution in the 1990s, before sports tiers were created, than it was in 2003.⁴⁸⁶ Unlike Tennis Channel, Versus and Golf Channel also built their distribution by paying distributors, including Comcast, hundreds of millions of dollars in launch incentives to offset the cost of broad carriage.⁴⁸⁷ The difference in market conditions is reflected in the carriage agreements that Tennis Channel signed with MVPDs, including Comcast, that permitted carriage on a sports tier in order to obtain distribution.⁴⁸⁸

187. Moreover, Comcast executives, including Mr. Rigdon, based on his independent experience at Charter, testified that demand for Tennis Channel is

⁴⁸⁴ See *supra* ¶¶ 73-102.

⁴⁸⁵ See *supra* ¶¶ 74-77. Mr. Solomon testified that eight years is a “long time” by “the cable business standard.” *Supra* ¶ 75 n.185; see also *WealthTV*, 24 FCC Rcd at 13000 ¶ 65 (timing of market entry of two networks is a relevant distinguishing factor). Cases from the employment discrimination context, while implicating different policy concerns, can be instructive as to general principles of discrimination. *Cf. Shah v. Gen. Elec. Co.*, 816 F.2d 264, 271 (6th Cir. 1987) (length of employment is a relevant distinguishing factor when comparing two employees).

⁴⁸⁶ See *supra* ¶¶ 74-76.

⁴⁸⁷ See *supra* ¶ 14.

⁴⁸⁸ See *supra* ¶¶ 16-19.

significantly less than demand for Golf Channel or Versus.⁴⁸⁹ Tennis Channel produced no evidence to the contrary; in fact, Tennis Channel’s own documents acknowledged this discrepancy.⁴⁹⁰ The difference in the demand for the programming broadcast on Tennis Channel compared to the programming on Golf Channel and Versus is also reflected in vast cost differences for the programming that they respectively acquire and in their different ability to attract or retain subscribers.⁴⁹¹

188. The evidence also shows material differences in how the networks are positioned with respect to viewers, advertisers, and programming rights holders. Tennis Channel’s own demographic data and marketing presentations demonstrate the clear differences in the networks’ “target demographic group[s].”⁴⁹² Golf Channel and Versus viewers are two of the most male-skewing channels on television, whereas Tennis Channel – as it regularly emphasizes in pitches to advertisers and distributors – has an audience with a relatively even gender balance.⁴⁹³ In addition, Tennis Channel’s viewers are significantly {REDACTED} than Golf Channel’s and {REDACTED} than Versus’s.⁴⁹⁴ As a result of these disparities, advertisers view the networks very differently.⁴⁹⁵

⁴⁸⁹ See *supra* ¶¶ 78-79.

⁴⁹⁰ See *supra* ¶ 20 n.38 {REDACTED}

⁴⁹¹ See *supra* ¶¶ 79, 93.

⁴⁹² *WealthTV*, 24 FCC Rcd at 12980-81 ¶¶ 27-29; see *supra* ¶¶ 85, 88.

⁴⁹³ See *supra* ¶ 86.

⁴⁹⁴ See *supra* ¶ 88.

⁴⁹⁵ See *supra* ¶¶ 89-90.

189. Those differences are reflected in the respective image each network projects to its viewers.⁴⁹⁶ As Mr. Egan observed in his credible and unrebutted testimony, Tennis Channel projects a “hip,” “international” and “young” cosmopolitan image.⁴⁹⁷ In contrast, Golf Channel projects a “calm,” “mature” and country club persona, and Versus generally projects an “aggressive” and “violent” image.⁴⁹⁸

190. Perhaps the most compelling evidence that market forces, and not discrimination, dictate how the three networks are carried is that every major MVPD except Dish Network carries Versus and Golf Channel to more than { [REDACTED] } percent of its subscribers, and all major MVPDs, including DIRECTV and Dish Network, carry Versus and Golf Channel more broadly than they carry Tennis Channel.⁴⁹⁹

191. Market forces also were the cause of Comcast’s decisions relating to the Major League networks. The unrebutted testimony of Mr. Bond and Ms. Gaiski demonstrates that Comcast’s carriage decisions regarding MLB Network, NBA TV, and NHL Network were based on legitimate business reasons, including the negotiating strength of the Major Leagues and the popularity of their out-of-market packages, as well as the networks’ programming and the price reductions they offered.⁵⁰⁰ Tennis Channel offered no contrary fact evidence.

⁴⁹⁶ See *supra* ¶¶ 80-84.

⁴⁹⁷ See *supra* ¶ 80.

⁴⁹⁸ See *supra* ¶ 80.

⁴⁹⁹ See *supra* ¶ 60.

⁵⁰⁰ See *supra* ¶¶ 61-65.

IV. Comcast Was Not Required to Conduct a Cost-Benefit Analysis of Golf Channel and Versus in 2009

192. Section 616 does not require that the same cost-benefit analysis calculated on Tennis Channel’s 2009 proposal also have been administered to Golf Channel and Versus.⁵⁰¹ Both networks were well established in the market by 2009 and were not seeking to expand distribution beyond already existing levels.⁵⁰² Both networks were launched and achieved wide distribution during different market conditions when Tennis Channel did not yet exist.⁵⁰³ Tennis Channel lacks legal standing to claim discrimination as to how Versus and Golf Channel were treated in that earlier period, or to the consequences of that treatment years later in 2009.⁵⁰⁴

193. Even if Tennis Channel did have legal standing to challenge the past treatment of Golf Channel or Versus, Tennis Channel has failed to show that any of Comcast’s carriage decisions would not have passed a cost-benefit test. In fact, Comcast presented evidence that Golf Channel and Versus together paid hundreds of millions of dollars in launch incentives to distributors including Comcast to earn broad distribution.⁵⁰⁵ Tennis Channel failed to contest that proof. In addition, the cable industry changed dramatically between 1995 and 2009,⁵⁰⁶ and Section 616 does not

⁵⁰¹ See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 13000 ¶ 69.

⁵⁰² See *supra* ¶¶ 55-59.

⁵⁰³ See *supra* ¶ 55.

⁵⁰⁴ See *WealthTV*, 24 FCC Rcd at 12998 ¶ 65 (defendants could not have favored INHD over WealthTV in their 2003 decision to carry INHD “*because WealthTV had not yet launched at the time the defendants decided to carry INHD*” (emphasis in original)).

⁵⁰⁵ See *supra* ¶ 14.

⁵⁰⁶ See *supra* ¶¶ 11-15, 55-56, 74-77.

require MVPDs such as Comcast to make the same carriage decisions in different market conditions.⁵⁰⁷

194. The fact that carriage contracts periodically come up for renewal does not change the legal analysis. When a renewal merely involves extending a contract without material increases or decreases to distribution, it is not unlawful discrimination for an MVPD to keep the existing distribution in place without performing a full cost-benefit analysis.⁵⁰⁸ Such was the case at Comcast when the Versus and Golf Channel contracts were renewed in 2009 and 2011.⁵⁰⁹

195. The evidence was also uncontroverted that distributors rarely reposition established, broadly distributed networks such as Golf Channel and Versus because doing

⁵⁰⁷ *WealthTV*, 24 FCC Rcd at 12998-99 ¶ 64-65, 67 (recognizing that substantially different market conditions in different time periods resulted in different carriage objectives and decisions); *see also MASN*, 25 FCC Rcd at 18015-06 ¶ 13 & n.68 (finding that TWC legitimately considered the characteristics of different markets when making its carriage decisions for MASN and for its affiliated RSNs); *cf. Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995) (holding that defendant employer’s shift over time from seniority-based to skills-based layoff criteria was not evidence of its discriminatory intent).

⁵⁰⁸ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (“[A] vertically-integrated MVPD ‘[may treat] unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.’”); *WealthTV*, 24 FCC Rcd at 13000 ¶ 69 (“The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.”); *cf. Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006 (10th Cir. 1996) (finding that defendants had a legitimate business reason for not hiring plaintiffs because it was permissible to use different criteria to assess existing employees and new employees), *overruled in part on other grounds by Smith v. City of Jackson*, 544 U.S. 228 (2005); *Shah*, 816 F.2d at 271 (differential treatment of two employees did not raise inference of discrimination because one employee had worked at the company for more than twenty years while the other had worked at the company less than twenty months); *Pierson v. Norcliff Thayer, Inc.*, 605 F. Supp. 273, 277 (E.D. Mo. 1985) (differential treatment of employees was not considered discriminatory in part due to employees’ different levels of seniority).

⁵⁰⁹ *See supra* ¶ 56 & n.134.

so would upset the settled expectations of subscribers and generate subscriber churn.⁵¹⁰

There was testimony, for example, that when Charter threatened to negatively reposition Golf Channel and Versus in 2007, it received so many calls and e-mails from disgruntled subscribers that its call center was overwhelmed.⁵¹¹ It is not discrimination for MVPDs, such as Comcast, to seek to minimize this type of subscriber discontent by keeping well established networks in place.

196. Because Tennis Channel has presented no evidence that Comcast's carriage decisions as to Golf Channel and Versus were not justified on a cost-benefit basis, and has failed to controvert the evidence that the decisions were justified on that basis, Tennis Channel has failed to show that Comcast's cost-benefit analysis of the 2009 proposal was discriminatory.

V. Tennis Channel Has Failed to Establish That the Relief That It Requests Is Necessary or Appropriate

197. Tennis Channel has not proved the required elements for a Section 616 claim, and thus is not entitled to any relief in this matter.

198. In addition, the mandatory carriage and significant increase in total license fees that Tennis Channel is seeking in this matter are not proper under Section 616. Tennis Channel has failed to show that it is entitled to mandatory carriage at all, much less the mandatory carriage that it requests, which goes far beyond the network's acceptance by the marketplace generally. Further, mandatory carriage at increased total

⁵¹⁰ See *supra* ¶¶ 57-58.

⁵¹¹ See *supra* ¶ 59.

fees would constitute an economic windfall to Tennis Channel and not remediation of any competitive harm.⁵¹²

199. The appropriate remedy if a violation had been found in this matter would be the imposition of a forfeiture pursuant to Section 1.80 of the Commission’s rules.⁵¹³

But, as set forth above, there is no violation.

A. Broader Carriage of Tennis Channel by Comcast Should Not Be Mandated

200. Tennis Channel has failed to carry its burden of proving that broader carriage should be mandated.⁵¹⁴

201. High substantive and procedural standards ensure the protection of First Amendment rights, including Comcast’s right to exercise its editorial discretion without governmental interference.⁵¹⁵ The Supreme Court has made clear that “where the scales are in . . . an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.”⁵¹⁶ Courts have recognized the importance of not

⁵¹² See *WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (“Sections 616 and 76.1301(c) are designed to ‘strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations.’” (quoting *Second Report & Order*, 9 FCC Rcd at 2648 ¶ 14)).

⁵¹³ See 47 C.F.R. § 1.80.

⁵¹⁴ See Tennis Channel Exh. 18 (Complaint) ¶¶ 101-103.

⁵¹⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (“constitutional guarantees require” the imposition of an actual malice test in libel cases brought by public officials); *Zerilli v. Smith*, 656 F.2d 705, 712-15 (D.C. Cir. 1981) (“mindful of the preferred position of the First Amendment,” the court imposed a heavy burden on a party seeking disclosure of a confidential source).

⁵¹⁶ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); see also *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 590 (1983) (“[T]he possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.”).

treading on cable operators' editorial discretion.⁵¹⁷ The Commission has recognized this principle in the program carriage context.⁵¹⁸

202. In *MASN*, the Commission found “that the Bureau misapplied Section 616(a)(3)’s standard by failing to give due credit to TWC’s proffered reasons for declining to carry *MASN* on an analog tier” and that the defendant’s “carriage decision was a reasonable exercise of editorial discretion.”⁵¹⁹ Thus, considerable deference should be given to Comcast’s editorial decision to place Tennis Channel on a sports tier to broaden the diversity of its programming without increasing the costs to its customers.⁵²⁰

203. The government has no interest – much less a compelling interest – in forcing broader carriage when the parties have an existing deal that grants Comcast the right to carry Tennis Channel on a sports tier, and when Tennis Channel could obtain increased distribution by lowering its price and/or providing Comcast with other

⁵¹⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (“[W]e are unable to ignore Congress’ stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by . . . cable operators”); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (“[W]e cannot see how the word unfair could plausibly apply to . . . legitimate, independent editorial choices”); see also *Turner Broad. Sys., Inc.*, 512 U.S. at 636-37 (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”).

⁵¹⁸ See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12.

⁵¹⁹ *Id.*

⁵²⁰ See *Kucinich*, 23 FCC Rcd at 482-83 ¶ 2; cf. *CBS, Inc.*, 453 U.S. at 396 (“The Commission has stated that, in enforcing [Section 312(a)(7) of the Communications Act of 1934], it will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.” (internal quotation marks omitted)); *Miami Herald Publ’g Co.*, 418 U.S. at 258.

incentives.⁵²¹ In particular, the government cannot impose speech upon Comcast simply to provide economic gain to Tennis Channel.⁵²²

B. The Level of Carriage That Tennis Channel Demands Is an Inappropriate Remedy for Tennis Channel’s Claim

204. Mandatory carriage at the penetration requested by Tennis Channel is especially inappropriate. The additional carriage that Tennis Channel requests goes beyond the level it proposed in 2009, and far beyond Tennis Channel’s carriage in the marketplace generally. The carriage requested by Tennis Channel would result, for example, in more Comcast subscribers to Tennis Channel than the [REDACTED]

[REDACTED]

[REDACTED] }⁵²³

205. “[A] case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only reasonable and meaningful method of enforcing Section 616.”⁵²⁴ Here, the “specific behavior” challenged by Tennis Channel is Comcast’s rejection of Tennis Channel’s 2009 proposal for D0 or D1 carriage.⁵²⁵ Thus, ordering any carriage broader than the D1 carriage that Tennis Channel would have accepted in 2009 would not be appropriate under any

⁵²¹ See *supra* ¶¶ 138-40, 149.

⁵²² See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 800 (1988) (First Amendment prohibits the government from compelling speech “absent compelling necessity, and then, only by means precisely tailored”); see also *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁵²³ See *supra* ¶ 148.

⁵²⁴ *Second Report & Order*, 9 FCC Rcd at 2653-54 ¶ 27.

⁵²⁵ See, e.g., Tennis Channel Exh. 18 (Complaint) ¶ 52; Tennis Channel Opening, Apr. 25, 2011 Tr. 116:5-12.

circumstances because it would not be “based on the specific behavior involved in [the alleged] violation.”⁵²⁶

206. Further, mandating the additional carriage that Tennis Channel demands – or even the additional carriage that Tennis Channel requested in 2009 – would be contrary to Congress’s instruction to the Commission that, in implementing Section 616, it should “rely on the marketplace to the maximum extent feasible.”⁵²⁷ Tennis Channel’s own figures show that distributors (other than Comcast) carry the network at an average penetration of only [REDACTED] and that number is inflated by the fact that it includes DIRECTV and Dish Network, which carry the network pursuant to equity-for-carriage deals, and does not take into account the large number of distributors that do not carry Tennis Channel at all.⁵²⁸ If DIRECTV and Dish Network are excluded because of their affiliation with Tennis Channel, then Tennis Channel’s average carriage in the marketplace (again not including Comcast or distributors that do not carry it) is only [REDACTED].⁵²⁹ It would be inconsistent with the requirement that the Commission “rely on the marketplace to the maximum extent feasible” to mandate carriage at any greater level of penetration.

⁵²⁶ *Second Report & Order*, 9 FCC Rcd at 2653-54 ¶ 27.

⁵²⁷ 1992 Cable Act § 2(b)(2); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁵²⁸ Comcast Exh. 201.

⁵²⁹ Comcast Exh. 201.

C. Tennis Channel Has Not Carried Its Burden of Proving That It Is Entitled to Any Additional License Fees

207. Increasing the total license fees would not be in the public interest, as it would impose additional costs on Comcast and, ultimately, its subscribers, in connection with carrying Tennis Channel more broadly.⁵³⁰ No such relief is warranted in this case.

208. In particular, Comcast should not, as Tennis Channel demands,⁵³¹ be mandated to carry Tennis Channel more broadly at the per-subscriber license fees set forth in the Affiliation Agreement. Carriage deals involve numerous interrelated terms, and the Affiliation Agreement is an integrated contract that grants Comcast the right to carry Tennis Channel on a sports tier.⁵³² The evidence shows that Tennis Channel justified its rate card by emphasizing the economics of sports tier carriage, and Comcast agreed to those rates only because it intended to carry Tennis Channel on a sports tier.⁵³³

209. Imposing those rates for broader, non-sports tier carriage – for which Comcast would *not*, as intended, be earning sports tier revenue – would deprive Comcast of the benefit of the bargain that the parties struck while granting an undeserved windfall to Tennis Channel. Although an increase in distribution might better enable Tennis Channel to compete for more advertising revenues or programming rights, Tennis Channel has not proved that it would be unable to compete fairly without dramatic

⁵³⁰ See H.R. Rep. 102-628, at 77 (“Fair competition in the delivery of television programming should foster the greatest possible choice of programming and should result in lower prices for consumers.”).

⁵³¹ Tennis Channel Exh. 18 (Complaint) ¶ 102.

⁵³² See *supra* ¶ 149.

⁵³³ See *supra* ¶ 16 n.31.

increases in Comcast’s licensing fees, and remedial relief under Section 616 must be limited to what is necessary for an independent programmer to “compete fairly.”⁵³⁴

210. The evidence contains several instructive examples in the marketplace where Comcast has provided broader carriage to networks that have agreed to economic terms that offset the additional cost to Comcast. Of particular note is the example of the NHL Network, a Major League network with programming that is significantly more compelling than Tennis Channel’s programming in terms of its ability to retain or attract subscribers, which incentivized Comcast to melt it from the sports tier to D1 by offering a rate reduction that would result in no material increase in the total license fee paid by Comcast.⁵³⁵

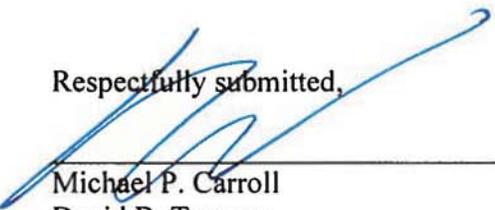
⁵³⁴ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁵³⁵ See *supra* ¶¶ 150-51.

CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the Proposed Findings of Fact and Conclusions of Law be adopted by the Presiding Judge in support of a decision denying the relief sought by Tennis Channel in this carriage complaint proceeding.

Respectfully submitted,



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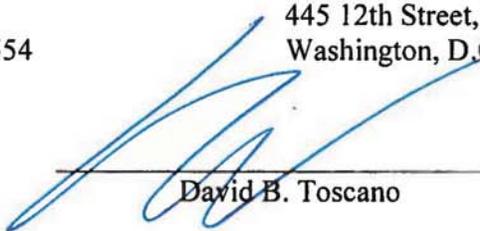
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